# 91-1598

NO. ( )

Supreme Court, U.S.
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UNITED STATES SUPREME COURT

October 1991

FRANCISCO JAVIER MUNOZ-ROMO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Trial Court Violated Munoz's Fifth Amendment Rights Under the United States Constitution by Convicting Munoz Twice for Possessing the Same Firearm?

2. Whether Munoz's Fifth Amendment Rights Under the United States Constitution Were Violated When He was Sentenced Twice for Violating One Statute?

3. Whether the Trial Court Erred by not Acquitting on the Firearm-Possession Counts Because There Was Insufficient Evidence that Munoz Possessed the Firearms?

4. Whether the Trial Court Erred in Sentencing Munoz Under Section 924(e)?

5. Whether the Trial Court Erred in Failing to Grant an Acquittal on the Money-Laundering Offenses Because There was no Evidence That he Used Proceeds From Unlawful Activity?

6. Whether Munoz's Sixth Amendment Rights Under the United States Constitution Were Violated, Because He was Denied Effective Assistance of

Counsel Which Severely Prejudiced his Right to a Fair Trial?

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## STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1990). Petitioner seeks review of a decision rendered by the United States Court of Appeals for the Fifth Court on November 5, 1991. Petitioner filed a Motion for Rehearing in the United States Court of Appeals, which was denied on December 3, 1991.

## CONSTITUTIONAL AND STATUTORY PROVISIONS RELEVANT TO CASE

1. Firearm Possession Statute

It shall be unlawful for any person --

> (1) Who has been convicted on a count of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * *
>
> (5) Who, being an alien, is illegally or unlawfully in the United States.
>
> * * *
>
> to . . . possess in or affecting commerce, any firearm or ammunition.

18 U.S.C. § 922(g) (1990).

2. Sentence Enhancement Statute

> In the case of any person who violates § 922(g) of this article and has three previous convictions by any court referred to in § 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than 15 years, and, notwithstanding any provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction of under § 922(g), and such person shall not be eligible for parole with respect of the sentence imposed under this subsection.

18 U.S.C. § 924(e) (1990)

3. Money-Laundering Statute

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity --

(a)(1) With the intent to promote the carrying on of specified unlawful activity . . .

18 U.S.C. § 1956(a)(1) (1990)

## STATEMENT OF THE CASE

### I. Course of Proceedings and Disposition Below

On October 18, 1988, Petitioner Francisco Javier Munoz-Romo ("Munoz") was indicted on eleven counts. (R. 163-169).[1] The indictment charged that Munoz illegally distributed cocaine, possessed two firearms, and engaged in money-laundering. See 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) (1981) (narcotics distribution); 18 U.S.C. §§ 922(g)(1) and 924(a)(1)(B) (1990) (firearm-possession by a convicted felon); 18 U.S.C. §§ 922(g)(5) and 924(a)(1)(B) (1990) (firearm-possession by an illegal alien); 18 U.S.C. § 1956(a)(1)(A) (1990) (money-laundering). (R. 163-69).

After a four-day trial, the jury convicted Munoz on ten of the eleven counts. (Tr. 575-77). The trial court granted an acquittal as to the eleventh count. (Tr. 311). Munoz was sentenced to

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[1] Citations to the record will be cited as "R. ____." All trial transcript references will be cited as "Tr. ____."

240 months for the cocaine-distribution and money-laundering offenses, 22 months for the firearm-possession and 180 months for the firearm-possession under an enhancement statute. All sentences were to run concurrently. (R.90-92).

On March 6, 1989, Munoz filed a pro se notice of appeal. (R. 89). On June 2, 1989, the Court of Appeals dismissed the appeal due to Munoz's failure to order the transcript. (R. 86). Munoz then filed with this Court motions to reinstate the appeal, for leave to appeal in forma pauperis, for appointment of counsel, and for the Court to supply transcript for appeal. (R. 83-85). The Court of Appeals returned these motions to Munoz, advising him that he should file them with the district court. (R. 70). On July 14, 1989, Munoz did so. (R. 52-57). On January 23, 1991, the district court granted Munoz's motion to proceed in forma pauperis and his motion for the court to supply transcript for appeal. (R. 1-2). On March 4, 1991, the Court of Appeals granted Munoz's motion for appointment of counsel and appointed the

undersigned to represent Munoz in this appeal. The Court of Appeals heard oral argument on September 5, 1991, and rendered its decision affirming the convictions and vacating the sentence in part on November 5, 1991.

II. Statement of Facts

In July 1988, the United States Government ("Government" or "United States"), through its various branches, conducted a "sting" to trap the Petitioner in a cocaine purchase. The Government hired James A. Linberg, Jr. ("Linberg"), as an informant, and instructed him to purchase cocaine from Munoz. (Tr. 50). Linberg went to a bar in Victoria, Texas, and purchased cocaine (Tr. 54-57). The only evidence linking Munoz to this transaction is the testimony of Linberg, an admitted cocaine addict who was paid to participate in this trap. (Tr. 53, 56, 62, 63).

The overwhelming evidence, however, negates Munoz's involvement in this transaction. No one witnessed the transaction between Linberg and the seller, and no one was able to testify at trial

that he or she saw Munoz sell Linberg cocaine. (Tr. 145-156, 153). Significantly, despite the fact that the Government was given packets containing the cocaine, which Munoz allegedly handled, no evidence was introduced establishing that Munoz's fingerprints were on these packets. (Tr. 153). Munoz also denied that he sold the cocaine to Linberg. (Tr. 377). Indeed, the evidence adduced at trial indicates that Munoz's involvement in this narcotics sale would have been completely out of character. The evidence conclusively proved that Munoz had not been implicated in any crime since 1985. (Tr. 104, 112, 334, 339).

The Government chose not to arrest Munoz after the alleged sales of narcotics that occurred on August 30 and 31, 1988. Rather, the Government waited until September 14, 1988. Then, the Government arrested Munoz and executed several search warrants. Although the Government seized a large number of items during the course of its search, only a small number were introduced at trial. Further, the real evidence introduced had

no direct bearing on the issues upon which Munoz was tried and should not have been admitted had Munoz's trial counsel properly objected to its introduction. Moreover, the Government alleged that Munoz was a cocaine dealer. Yet, the search did not produce a trace of cocaine. (Tr. 161). The absence of cocaine certainly is consistent with the fact that Munoz was not implicated in any crimes since his release in 1985.

Following his arrest, Munoz was indicted for delivery of cocaine, possession of two firearms, and money-laundering. (R. 163-69). The firearm-possession indictments stemmed from two guns located in the search.[2] One of these guns belonged to Mrs. Munoz, whose father gave it to her before he died. (Tr. 330). Indeed, Munoz was not even

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[2] There are two firearms at issue in this case. One was located during the course of a search of an apartment located at 135 Sherwood in Victoria, Texas. (Tr. 175). This firearm will be referred to herein as the "Sherwood Firearm." The other was a revolver located in a suitcase at 1402 East Warren Street. (Tr. 138). This firearm shall be referred to herein as the "Warren Street Firearm."

aware that his wife had this gun; it was kept in her locked suitcase. (Tr. 330).

Government agents found the other gun under a mattress located in an apartment at 135 Sherwood in Victoria, Texas. (Tr. 137, 175). The uncontroverted evidence, however, established that neither Munoz nor his wife were residing at the apartment when the search warrant was executed. (Tr. 192, 331). The Munoz's had rented the apartment at 135 Sherwood, because their daughter was expecting a child. The daughter lived next door, and the Munoz's wanted to be near her in the event there was an emergency. (Tr. 321). The Munoz's left the apartment shortly after their grandchild was born and, at the time the search was conducted, had not lived at the apartment for several months. (Tr. 322).

In short, the Government failed to prove that Munoz possessed, actively or constructively, the firearms in question. Importantly, although fingerprints were taken from both firearms, no evidence was introduced establishing that Munoz had

handled either gun. (Tr. 178). The Government failed to produce any conclusive evidence linking the Petitioner to possession of either gun. The Government failed to meet its burden of proof establishing that Munoz possessed these firearms. Consequently, this Court should not uphold the convictions for firearm-possessions.

To support a conviction on the money-laundering counts, the Government proved that Munoz purchased a home and made the $5,486 down payment in cash and that he purchased two automobiles, totalling slightly more than $12,000, for cash. (Tr. 240, 250, 256). The Government failed to introduce any evidence, however, that these items were purchased with *the proceeds of illegal activity*. Indeed, the uncontroverted evidence established that the property was *not* purchased with proceeds from illegal activity. Instead, the evidence established that Munoz received a $36,000 inheritance when his mother died. (Tr. 337, 380, 385). Munoz used the inheritance money to make the down payment on the house and to pay for the two

automobiles. (Tr. 337, 380, 385). This evidence was uncontroverted.

This is a review of an appeal to the United States Court of Appeals. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 (1990) because the trial court's conviction was a final appealable order under 28 U.S.C. § 1291 (1990).

## ARGUMENT

### I. Whether the Trial Court Violated Munoz's Fifth Amendment Rights Under the United States Constitution by Convicting Munoz on Two Counts for the Same Offense?

Munoz was convicted on five counts of firearm-possession. There were, however, only two firearms involved in this case. Munoz was convicted twice for possession of the same two firearms and was also given an enhanced sentence under 18 U.S.C. § 924(e).[3] (R. 90-92). Munoz was first convicted as a felon in possession of the Sherwood Firearm; he was then convicted as an illegal alien in possession of the same firearm.

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[3] The enhancement section of the statute and its application to this case is discussed in section II *infra*.

The same double conviction occurred with respect to the Warren Street Firearm. Petitioner was first convicted as a felon in possession of this firearm; he was then convicted as an illegal alien in possession of the same firearm. Hence, Munoz was convicted twice for the same offense -- possession of a firearm. This double conviction violates Munoz's constitutional rights and overrides congressional intent.

A. The Statute Provides for Only One Conviction.

18 U.S.C. § 922 is written in the disjunctive. It is a violation of this statute for a convicted felon or an illegal alien to possess a firearm. See 18 U.S.C. § 922 (1990). The statute does *not* provide for a double conviction for a person who is both a convicted felon and an illegal alien in possession of a firearm. In Whalen v. United States, 445 U.S. 684, 692 (1980), the Supreme Court stated that "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the

absence of a clear indication of contrary Legislative intent." Id. at 692. In United States v. Clements, 471 F.2d 1253 (9th Cir. 1972), the defendant was convicted for a single act that violated subsections (c), (d) and (f) of 26 U.S.C. 5861. The district court in Clements imposed sentences of 10 years imprisonment on each count. The Ninth Circuit held that the imposition of consecutive maximum sentences for multiple offenses arising from the same transaction pyramids punishments when such multiple punishments are not authorized by Congress. Id. at 1258. The sentences were, therefore, vacated and the cause remanded to the district court for resentencing. Id.[4] In the instant case, imposing multiple

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[4] The holding in Clements has been discussed and approved in numerous subsequent cases. See United States vs. Kaplan, 588 F.2d 71, 74-75 (4th Cir. 1978); United States v. Kalama, 549 F.2d 594, 597 (9th Cir. 1976), cert. denied, 429 U.S. 1110 (1977); Rollins v. United States, 543 F.2d 574, 575 (5th Cir. 1976); United States v. Ackerson, 502 F.2d 300, 305 (8th Cir. 1974), vacated on other grounds, 419 U.S. 1099 (1975); United States v. Tankersley, 492 F.2d 962, 969 (7th Cir. 1974); United States v. Jones, 487 F.2d 676, 679 n. 1 (9th Cir. 1973).

sentences arising from the same transaction is not permitted, unless specifically authorized by Congress. There is no evidence in the congressional record or in the statute itself that Congress intended to authorize multiple prosecutions and convictions for the same offense.

The proscribed conduct under section 922(g) is the possession of a firearm. In the instant case, there was only one possession. Thus, in order to convict Munoz on multiple counts for possession of the same firearm, the United States must show that Congress clearly intended to permit multiple convictions for the same offense. Had Congress intended a double conviction for such a person, it could have created separate statutes for felons in possession and for illegal aliens in possession of a firearm. Alternatively, Congress could have stated that multiple convictions were permissible under section 922, and that a person may be convicted under each provision of the statute. Congress did neither. Because Congress did not clearly provide for multiple convictions under

section 922(g), Munoz should not have been convicted on counts three and five as well as counts four and six. Consequently, this Court should reverse at least two of the firearm-possession convictions.

B. Convicting Munoz Twice for the Same Offense Violates His Constitutional Rights.

The double jeopardy clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V (1987). Convicting Munoz as a felon and an illegal alien in possession of firearms violates this provision of the Constitution.

The offense in this case is possession.[5] Munoz was convicted twice for the same offense --

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[5] Munoz is in no way conceding that the Government proved that he possessed any of the guns in question. To the contrary, Munoz will show the Court that the Government failed to meet its burden of proof under section 922(g). See Section III, *infra*. For purposes of this section, Munoz argues that even if the Government proved possession, he could not be convicted twice for the same offense.

possession. He was convicted twice for possession of the Sherwood Firearm. He was also convicted twice for possession of the Warren Street Firearm. Yet, there was only one possession, one offense, as to each firearm. Consequently, convicting Munoz twice for the same offense violates his constitutional rights.

Several courts have held that a defendant cannot be convicted twice for the same offense under this statute.[6] See United States v. Evans, 854 F.2d 56 (5th Cir. 1988) (holding that defendant could not be convicted twice for supplying false information to purchase both firearm and ammunition; prohibited offense was supplying false information which occurred only once); United States v. Marino, 682 F.2d 449, 453-54 (3d Cir. 1982) (holding that government could not treat each

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[6] Some of the cases cited were decided under 18 U.S.C. § 922. Others were decided under its predecessor statute, 18 U.S.C. App. § 1202 (1985). Although there are substantive differences between the two statutes, they are identical for purposes of all arguments urged here. *Compare* 18 U.S.C. § 922 (1990) *with* 18 U.S.C. App. § 1202 (1985).

of several firearms simultaneously possessed as a separate offense for prosecution); United States v. Kinsley, 518 F.2d 665, 669-70 (8th Cir. 1975) (holding that statute is ambiguous with respect to multiple prosecutions and ambiguity is resolved in favor of defendant allowing only one conviction). Other courts have also held that a defendant could not be convicted for both receipt of and possession of the same firearm under the statute. See Ball v. United States, 470 U.S. 854, 862 (1985) (holding that a convicted felon could not suffer two convictions or sentences for receiving and possessing the same weapon or a single act established the receipt and possession); United States v. Thomas, 810 F.2d 478, 479 (5th Cir.), cert. denied, 482 U.S. 930 (1987) (holding that although the Government may prosecute for both possession and receipt of a weapon by a convicted felon, it may only convict and sentence under one of the two statutes). Reasoning that there was only one offense, these courts concluded that

allowing a double conviction for the same offense violates the Constitution.

The same reasoning applies also to Munoz. Here there was only one offense --possession. Munoz was convicted twice for the same offense of possession in violation of his constitutional rights under the Fifth Amendment of the United States Constitution. Consequently, this Court should reverse at least two of the firearm-possession convictions.

C. The United States failed to show that Congress intended to allow multiple prosecutions under 18 U.S.C. § 922.

1. The Blockburger test does not apply to this case.

The Court of Appeals quoted this Supreme Court's decisions in Blockburger v. United States, 284 U.S. 299 (1932), and Whalen v. United States, 445 U.S. 684 (1980), in affirming the multiple convictions under 18 U.S.C. § 922(g). See Op. at 8. Blockburger and Whalen, however, are inapposite. Blockburger and its progeny apply "where the same act or transaction constitutes a violation of two distinct statutory provisions...."

Blockburger, 284 U.S. at 304 (emphasis added). The issue in this case is whether Munoz's constitutional rights were violated when he was convicted twice for the same offense *under the same statute*; there were not two distinct statutory provisions involved in this case. Consequently, the Blockburger test does not apply to this case.

In United States v. Davis, 656 F.2d 153 (5th Cir. 1981), the Court held that when a defendant is convicted twice under the same statute, the Blockburger test does not apply. Id. at 156. Rather, the relevant inquiry is whether Congress intended to impose multiple sentences for a violation of the same offense. Id. at 157; see also United States v. Deaton, 468 F.2d 541, 546 (5th Cir. 1972) (reversing multiple convictions under 18 U.S.C. § 1072, because of insufficient authority "that Congress clearly intended that the number of sentences of a man may be given for a single cause of action of concealment could be determined by adding up the number of escapees concealed..."). To support multiple convictions

for firearm-possession, therefore, the Government must prove that Congress clearly intended to allow multiple convictions for the same offense under 18 U.S.C. § 922(g). The Government has not met this burden.

2. Under the Rule of Lenity, Munoz could not be convicted twice for the same offense under 18 U.S.C. § 922.

In Bell v. United States, 349 U.S. 81 (1955), this Court decided whether Congress intended to allow multiple convictions under the Mann Act, 18 U.S.C. §§ 2421-2424 (1970). The Court held that the statute was ambiguous regarding the permissibility of multiple convictions. This Court held further that any such ambiguity should be resolved *against* allowing multiple convictions.

> When Congress has the will it has no difficulty in expressing it -- when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each unit stick in a faggot a single criminal unit. When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.... It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of harsher punishment.

Bell, 349 U.S. at 83.

The holding in Bell has been referred to as the Rule of Lenity regarding the imposition of multiple convictions for a violation of a single statute. "This policy of lenity means that the [courts] will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Ladner v. United States, 358 U.S. 169, 178 (1958) (holding that the single discharge of a shotgun wounding two federal officers constituted only a single act of assault).

The Rule of Lenity applies to this case. The Government must prove that Congress clearly intended to allow multiple prosecutions under the same statute, 18 U.S.C. § 922 (1990). Any doubt or ambiguity about the permissibility of such multiple prosecutions must be resolved in Munoz's favor, against allowing this increased punishment.

Nothing contained in 18 U.S.C. § 922(g) provides, directly or indirectly, that a person may be convicted twice for the possession of one firearm. The Government has not provided any support that Congress clearly intended to permit multiple convictions of this statute. Because Congress did not specifically provide for multiple prosecutions under section 922(g), this Court would have to "guess what Congress intended" regarding multiple prosecutions. Ladner prohibits such a result. At best, therefore, the statute is ambiguous regarding the permissibility of multiple prosecutions. This ambiguity must, under the Rule of Lenity, be resolved against allowing multiple convictions. Consequently, this Court should grant the petition for writ of certiarori.

II. Whether Munoz's Fifth Amendment Rights Under the United States Constitution Were Violated When He was Sentenced Twice for the Same Offense?

A. The Multiple Convictions Violate the Double Jeopardy Clause of the United States Constitution

Munoz's constitutional rights under the Fifth Amendment of the United States Constitution were

also violated when he was sentenced twice for the same offense. Munoz was sentenced to 22 months confinement under § 922(g) as a felon in possession of a firearm. Munoz was also sentenced to 180 months under 18 U.S.C. § 924(e). Section 924(e)(1) provides that a person who violates section 922(g) and is a three-time convicted felon shall be sentenced to not less than 15-years imprisonment. See id. Section 924(e) is not a substantive statute; it is merely a sentence-enhancement statute. See United States v. Ortega, 859 F.2d 327, 331 n. 3 (5th Cir. 1988), cert. denied, 489 U.S. 1027 (1989) (overruling United States v. Davis, 801 F.2d 754 (5th Cir. 1986) and holding that section 924(e) does not contain substantive elements of an offense, but is merely a provision for sentence enhancement under section 922(g)).[7] Because section

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[7] See also United States v. Rumney, 867 F.2d 714, 717 (1st Cir. 1989) (holding that section 924(e) is a sentence-enhancement provision), cert. denied sub. nom., Taylor v. United States, ____ U.S. ____, 110 S.Ct. 2592 (1990); United States v. Brewer, 853 F.2d 1319 (6th Cir) (same), cert. denied, 488 U.S. 946 (1988); United States v. (continued...)

924(e) merely enhances a sentence for a violation of section 922(g), it is not a statute that sets forth independent substantive violations. One cannot, therefore, be convicted and sentenced under section 922(g) *and* sentenced under section 924(e).

Munoz, however, was sentenced under both section 922(g) and 924(e). (R. 90, 163-169). Section 924(e), however, merely imposes a sentence for a violation of 922(g). See 18 U.S.C. § 924(e) (1990). Munoz was, therefore, sentenced twice under section 922(g) for the same offense. This double sentence clearly constitutes a Fifth Amendment violation.

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[7] (...continued)
Pirovolos, 844 F.2d 415, 420 (7th Cir.) (same), cert. denied, 488 U.S. 857 (1988); United States v. Rush, 840 F.2d 574, 576-78 (8th Cir.) (same), cert. denied, 487 U.S. 1238 (1988); United States v. Blannon, 836 F.2d 843, 845-46 (4th Cir.) (same), cert. denied, 486 U.S. 1010 (1988); United States v. West, 826 F.2d 909, 911-12 (9th Cir. 1987) (same); United States v. Jackson, 824 F.2d 21, 22-26 (D.C. Cir. 1987) (same), cert. denied, 484 U.S. 1013 (1988); United States v. Hawkins, 811 F.2d 210, 217-20 (3d Cir) (same), cert. denied, 484 U.S. 833 (1987); United States v. Gregg, 803 F.2d 568, 570 (10th Cir. 1986) (same), cert. denied, 480 U.S. 920 (1987).

Consequently, this Court should reverse at least one conviction.

Courts have long held that the double jeopardy clause of the United States Constitution protects against "multiple punishments for the same offense." See Albernaz v. United States, 450 U.S. 333, 343-44 (1981) (citing North Carolina v. Pierce, 395 U.S. 711, 717 (1969)); Brown v. Ohio, 432 U.S. 161, 165 (1977); United States v. Bigelow, 897 F.2d 160, 161 (5th Cir. 1990). In the instant case, convicting and sentencing Munoz twice for the same violation of section 922(g) violates Munoz's rights against double jeopardy as protected by the Fifth Amendment.

B. The Sentences Imposed Under Counts V and VII of the Indictment Should be Vacated and the Case Remanded for Resentencing.

The Court of Appeals found that Munoz was illegally sentenced, in violation of his constitutional rights, under both Counts V and VII of the indictment. The Court of Appeals attempts to placate this constitutional violation by vacating one of the two illegal sentences. The Court of

Appeals seems to ignore the fact that by exposing Munoz to multiple punishments for the same offense, the Government has violated not only "the specific guarantees against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." Whalen v. United States, 445 U.S. 684, 689 (1980).

Vacating the sentence imposed under Court V of the indictment, while affirming the sentence imposed under Count VII is inappropriate. 18 U.S.C. § 924(e), the statute under which Munoz was sentenced in Court VII, contains many qualifications regarding its applicability. For example, this statute only applies to "previous convictions by a court referred to in section 922(g)," the statute only applies to prior convictions for a "violent felony or a serious drug offense," and the statute only applies to convictions "committed on occasions different from one another...." Thus, the applicability of section 924(e) is a factual matter properly decided by the trial court, as opposed to

this Court. Because the trial court imposed an illegal sentence, in violation of Munoz's constitutional rights, the trial court should make the determination as to which of the sentences, if any, should be upheld.

Accordingly, Munoz requests that this Court grant the petition for writ of certiorari.

III. Whether the Trial Court Erred by not Acquitting on the Firearm-Possession Counts?

This Court should reverse the convictions for the unlawful possession of firearms. Munoz was indicted on two counts of possession of firearms by a convicted felon under 18 U.S.C. § 922(g)(1). (R. 164-166). Munoz was indicted also on two counts for possession of a firearm by an illegal alien under 18 U.S.C. § 922(g)(5). (R. 164-166). The relevant portion of section 922 provides:

> It shall be unlawful for any person --
>
> (1) Who has been convicted on a count of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * *

> (5) Who, being an alien, is illegally or unlawfully in the United States.
>
> * * *
>
> to . . . possess in or affecting commerce, any firearm or ammunition.

18 U.S.C. § 922(g) (1990).[8] When the Government rested, Munoz moved for a judgment of acquittal on all counts, including the firearm-possession counts. (Tr. 311). Despite the fact that the Government failed to meet its burden of proof with regard to the firearm-possession counts, the trial court denied Munoz's motion. (Tr. 314). The trial court erred, because the Government failed to prove its case. The Government failed to satisfy the elements of the statute. Specifically, the Government did not prove that Munoz possessed a firearm in or affecting commerce. As a result, the

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[8] Munoz does not challenge the sufficiency of the evidence regarding his prior conviction for a crime punishable for more than one year. Munoz further admits that the Government sufficiently proved that he was an illegal alien under the statute.

trial court erred in refusing to grant Munoz's motion for acquittal.

A. The Sufficiency of the Evidence Standard.

The standard of review that this Court applies in reviewing sufficiency of the evidence challenges is whether, after reviewing the evidence presented and all inferences that may reasonably be drawn from it in the light most favorable to the Government, any reasonably minded jury could have found that the defendant was guilty beyond a reasonable doubt. United States v. Triplett, 922 F.2d 1174, 1177 (5th Cir. 1991). The evidence does not have to establish every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. Id. at 1177.

The Court of Appeals found that, because Munoz did not renew his motion for acquittal at the close of all the evidence, the standard of review is "only to determine whether affirmance of the

conviction would result in a 'manifest miscarriage of justice.'" Op. at 12. This cannot, however, be the appropriate standard of review in this case.

The lower Court is correct that Munoz did not move for a judgment of acquittal at the close of all the evidence. This procedural error, however, should not be held against Munoz, by imposing upon him a more stringent standard when reviewing the sufficiency of the evidence to support his convictions for firearms possession and money-laundering. The failure to review the motion for acquittal was the fault of Munoz's trial counsel, not Munoz. As discussed *infra*, Munoz was denied his right to effective assistance of counsel, in violation of his constitutionally guaranteed rights under the Sixth Amendment. The failure to review the motion for acquittal is another example of the ineffectiveness of Munoz's counsel. If this Court imposes a higher standard of review, based on the failure to renew the motion for acquittal, this Court would be penalizing Munoz for a situation

that is itself a violation of his constitutional rights.

Because of the inherent injustice in penalizing Munoz for a violation of his constitutional rights, this Court should not impose a higher standard of review than it would had Munoz's rights not been violated. See Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (holding that Government may not punish an individual for exercising his constitutional rights). Indeed, to impose such a higher standard in this case would constitute a "manifest miscarriage of justice." Consequently, this Court should review the sufficiency of the evidence under the standard espoused in United States v. Triplett, 922 F.2d 1174, 1177 (5th Cir. 1981).

1. The Government Failed to Meet Its Burden of Proof Regarding the Warren Street Firearm.

At trial, it was undisputed that the Warren Street Firearm belonged to Mrs. Munoz, not Petitioner. Mrs. Munoz's father gave her the gun prior to his death. (Tr. 330, 374). Mrs. Munoz

kept the gun in a locked suitcase. (Tr. 330). Moreover, the evidence conclusively proved that Munoz did not know about the existence of the gun, much less its location. (Tr. 330, 374). Again, the Government did not cast doubt on this testimony. Significantly, the Government extracted fingerprints from the gun but did not produce any evidence that Munoz's fingerprints were located on the gun. (Tr. 178). In short, the Government failed to produce any evidence that Munoz knew that Mrs. Munoz kept the Warren Street Firearm at their house. The Government, therefore, failed to meet its burden of proof under 18 U.S.C. § 922(g).

a. Munoz Did Not Constructively Possess the Warren Street Firearm.

In order to prove possession under § 922, the Government must prove actual or constructive possession of the firearm. See United States v. Donofrio, 450 F.2d 1054, 1056 (5th Cir. 1971). In the instant case, there was no evidence that Munoz actually possessed the Warren Street Firearm. The evidence merely showed that the gun was located in

Mrs. Munoz's suitcase. (Tr. 138). Without evidence of actual possession, the Government then can support its case only by proving that Munoz constructively possessed the Warren Street Firearm.

To prove constructive possession, the Government had to prove that Munoz had the intent and the power to exercise dominion and control over the weapon. See United States v. Smith, 591 F.2d 1105, 1107 (5th Cir. 1979); United States v. Donofrio, 450 F.2d 1054, 1056 (5th Cir. 1970). Thus, the Government was required to prove both that Munoz intended to exercise dominion and control over the gun and that he had the means available to effectuate his intentions. The Government failed to meet this burden of proof.

To prove that Munoz intended to exercise control over the Warren Street Firearm, the Government was required to prove that Munoz knew of the gun's existence. It is axiomatic that one cannot intend to control a firearm that he does not know exists. Several courts have held, therefore, that the Government must prove that the defendant

knowingly possessed the firearm to sustain a conviction under section 922. See United States v. Hastings, 918 F.2d 369, 371 (2d Cir. 1990); United States v. Rumney, 867 F.2d 714, 721 (1st Cir. 1989), cert. denied sub. nom., Taylor v. United States, ___ U.S. ____, 110 S.Ct. 2592 (1990); United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988); United States v. Hatfield, 815 F.2d 1068, 1072 (6th Cir. 1987); United States v. Bruce, 704 F.2d 1048, 1049 (8th Cir. 1983); United States v. Allen, 699 F.2d 453, 458 (9th Cir. 1982).

The evidence here proves only the converse; Munoz had no knowledge that the firearm was located in Mrs. Munoz's suitcase. (Tr. 330, 374).[9] Consequently, the Government failed to meet its

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[9] Because the firearm was located in Mrs. Munoz's suitcase and, therefore, not in the plain view of the Appellant, the decision in United States v. Smith, 591 F.2d 1105 (5th Cir. 1979) is easily distinguishable. In Smith, the court held that where guns are in plain view or in a place where they could hardly escape one's knowledge, constructive possession may be found. Id. at 1107. Here, however, the firearm was not in plain view and was not in a place where it could hardly have escaped Appellant's knowledge. Smith, therefore, does not control.

burden of proof to show constructive possession of the firearm under section 922(g).

In United States v. Soto, 779 F.2d 558 (9th Cir. 1986), cert. denied, 484 U.S. 833 (1987), the defendant was charged under Section 922(g)(1) with possession of a firearm. The defendant was in a vehicle where firearms were located. The court held that the lack of defendant's fingerprints on several of the firearms coupled with the defendant's testimony that he did not know the guns were in the vehicle was insufficient evidence to support the verdict of conviction. "No other evidence suggests that Soto knew that the guns were in the van, much less that he had dominion or control over them." Id. at 560.

The same reasoning applies with equal force in this case. The lack of any evidence linking Munoz to this gun coupled with the testimony that Munoz did not know this gun was located in Mrs. Munoz's suitcase leads to only one conclusion: The jury verdict of conviction was not based on sufficient evidence.

The only evidence linking Munoz to this gun was the fact that it was found in his house. This evidence, however, is insufficient to sustain a finding of constructive possession beyond a reasonable doubt. As the court held in United States v. Stine, 458 F.Supp. 366 (E.D.Pa. 1978), the possession of a firearm by a convicted felon's spouse is not a criminal act. Id. at 369. Nor does section 922 make it unlawful for a convicted felon to have a wife that possesses a firearm. Under the Government's theory, it need only prove that Munoz was a convicted felon and that a firearm was located in his residence. Section 922 as construed by courts requires more. The Government must prove that the defendant possessed the firearm, actively or constructively. In this case, with respect to the Warren Street Firearm, the Government failed to meet its burden of proof. Consequently, the trial court erroneously refused to grant Munoz's motion for acquittal with respect to counts three and five alleging possession of the

Warren Street Firearm by a convicted felon and an illegal alien.

2. The Government Failed to Meet Its Burden of Proof With Respect to the Sherwood Firearm.

The Government failed also to prove that Munoz possessed the Sherwood Firearm. The Sherwood Firearm was located under a mattress in an apartment. (Tr. 137, 175). It is undisputed, however, that Munoz was not living at this apartment at the time of the search and had not lived there for several months. (Tr. 192, 331, 322). The evidence also established that Munoz had no knowledge that this gun was located under this mattress. (Tr. 375). There was no testimony that Munoz's fingerprints were located on the gun. There was no testimony of any one who had seen Munoz in possession of this gun. The Government's only evidence was that the gun was located at an apartment rented in the Petitioner's name. This evidence does not meet the Government's burden of proof.

a. The Government Failed to Prove that Munoz Knew of the Gun's Location.

The uncontroverted evidence at trial established that Munoz did not know the gun was located in this apartment.[10] Consequently, the Government did not prove with sufficient evidence that the Petitioner constructively possessed this firearm.[11] See United States v. Hastings, 918 F.2d 369, 371 (2d Cir. 1990); United States v. Rumney, 867 F.2d 714, 721 (1st Cir. 1989), cert. denied sub. nom., Taylor v. United States, ____ U.S. ____, 110 S.Ct. 2592 (1990); United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988); United States

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[10] The firearm located at the Sherwood apartment also was not in plain view nor was it in a place where Appellant could hardly notice it, particularly as he was no longer living at this address. As stated earlier, therefore, the decision in United States v. Smith, 591 F.2d 1105 (5th Cir. 1979) does not apply to the facts of this case.

[11] As stated earlier, the standard for sufficiency of the evidence is whether, after reviewing the evidence presented and all inferences that may reasonably be drawn from it in the light most favorable to the Government, any reasonably minded jury could have found that the defendant was guilty beyond a reasonable doubt. United States v. Tripplett, 922 F.2d 1174, 1177 (5th Cir. 1991).

v. Hatfield, 815 F.2d 1068, 1072 (6th Cir. 1987); United States v. Bruce, 704 F.2d 1048, 1049 (8th Cir. 1983); United States v. Allen, 699 F.2d 453, 458 (9th Cir. 1982). Munoz could not constructively possess the Sherwood Firearm if he did not know the gun was located in the apartment. See Donofrio, 450 F.2d at 1056. Consequently, the Government failed to meet its burden of proof under 18 U.S.C. § 922(g).

b. Munoz Did Not Exercise Dominion or Control Over the Gun.

The Government also failed to prove that Munoz had dominion or control over the Sherwood Firearm. Munoz was no longer residing at the Sherwood apartment. (Tr. 192, 322, 331). Consequently, he could not have exercised dominion or control over the gun. Consequently, the Government failed to meet its burden of proving that Munoz constructively possessed the Sherwood Firearm.

In United States v. Beverley, 750 F.2d 34 (6th Cir. 1984), the defendant was convicted of possession of a firearm. The firearm was found in

a waste paper basket at the defendant's foot in an apartment in which the defendant did not reside. The appellate court held that there was insufficient evidence to support the conviction. Evidence that the gun was found at the defendant's foot did not establish constructive possession when the evidence also showed that the defendant did not reside in the apartment. Id. at 37.

Similarly, in this case, evidence that a revolver was located under a mattress in an apartment at which Munoz no longer resided is insufficient to sustain a jury finding of constructive possession. Moreover, the Government presented no other evidence that Munoz had dominion or control over the Sherwood Firearm. The evidence presented by the Government was insufficient to support a verdict of conviction. Consequently, the trial court committed error in refusing to grant a judgment of acquittal on counts four and six alleging possession of the Sherwood Firearm by a convicted felon and by an illegal alien.

IV. Whether the Trial Court Erred in Sentencing Munoz Under Section 924(e)?

Munoz was sentenced to 180 months imprisonment under 18 U.S.C. § 924(e). Section 924(e) is merely a sentencing statute for violations of section 922(g). Here, however, the Government failed to meet its burden of proof under section 922(g). See discussion *supra* section III. The trial court should not, therefore, have sentenced Munoz under section 924(e). Consequently, this Court should reverse Munoz's conviction under section 924(e).

V. Whether the Trial Court Erred in Failing to Grant an Acquittal on the Money-Laundering Offenses?

A. There was no Evidence that the Property Represented the Proceeds From Unlawful Activity.

Munoz was convicted for three counts of money-laundering in violation of 18 U.S.C. § 1956. The pertinent section of this statute provides:

> Whoever, knowing that the property involved in a financial transaction *represents the proceeds of some form of unlawful activity*, conducts or attempts to conduct such a financial transaction which *in fact involves the proceeds of specified unlawful activity* --

> (a)(1) With the intent to promote the carrying on of specified unlawful activity . . .

18 U.S.C. § 1956(a)(1) (1990) (emphasis added). The Government alleged that Munoz used the proceeds from drug sales to purchase a house and two cars. (R. 163-169). The Government, however, failed to prove its case and failed to meet the requirements of the statute beyond a reasonable doubt.

The Government merely proved that Munoz purchased a home and made the down payment in cash and paid for two automobiles for cash. (Tr. 240, 250, 256). These purchases totalled approximately $17,500. (Tr. 250, 256). The Government, however, proved nothing more. The Government failed to prove that the cash used to purchase this property "represented the proceeds of some form of unlawful activity." Rather, the uncontroverted evidence in this case established that the items in question were purchased with funds Munoz inherited from his mother. This evidence established that Munoz received $36,000 in inheritance after his mother died. (Tr. 380, 385). The evidence further

established that Munoz used this money to purchase the two automobiles and pay the down payment on the house. (Tr. 337, 380, 385).

The uncontroverted evidence at trial, therefore, established that the source of funds used to purchase the cars and pay the down payment on the house was the inheritance money, not illegal activity. Thus, even accepting all the Government's evidence as true on a sufficiency challenge, the trial court should have acquitted Munoz of the money-laundering convictions. The Government failed to meet its burden establishing that the funds used to purchase this property represented the proceeds from unlawful activity. Consequently, Munoz requests that this Court reverse his convictions under 18 U.S.C. § 1956.

The Government's only evidence regarding the alleged money-laundering violations was that Munoz had limited income. (Tr. 426-433). This evidence, however, is insufficient to support the convictions for money-laundering. First, this evidence did not prove that the property in question was purchased

with proceeds of unlawful activity. Munoz introduced evidence that the property was purchased with inheritance money. Proving that Munoz had a limited income in no way disproves that the Munoz's purchased their house and two cars with inheritance money.

Further, evidence that the Petitioner had a limited income is insufficient, by itself, to support a conviction for money-laundering. The court in United States v. Blackman, 897 F.2d 309, 316-17 (8th Cir. 1990), addressed the question of tracing proceeds from illegal activity to support a conviction under the money-laundering statute. The court stated:

> we do not read this statute to require that the Government trace the proceeds to a *particular* sale. We do agree with [the defendant] that the Government cannot rely *exclusively* on proof that a defendant charged with proceeds from an unlawful activity has no legitimate source of income.

Id. at 316-17. The Government here relied exclusively on proof that the defendant had insufficient income to purchase the house and the cars without using proceeds from illegal activity.

That evidence did not meet the Blackman threshold.[12] Consequently, this Court should reverse the money-laundering convictions.

Several courts have required the United States to establish a causal nexus between illegal activity and particular funds in order to support a conviction or a forfeiture action. See United States v. $4,245,000, 762 F.2d 895, 903 (11th Cir. 1985) (holding that Government must show probable cause that seized property was involved with illegal drug or money-laundering transactions as specified by statutes), cert. denied, 474 U.S. 1056 (1986); United States v. All Monies ($477,048.62), 754 F.Supp. 1467, 1471 (D.Ha. 1991) (same); United States v. 88 Designated Accounts Containing Monies Traceable to Exchanges for Controlled Substances,

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[12] The court in Blackman issued a new opinion in which it found that expert testimony regarding drug dealers' use of wire services in furtherance of their drug activities supported the jury's verdict of conviction under the money-laundering statutes. See United States v. Blackmon, 904 F.2d 1250, 1257 (8th Cir. 1990). There is no question that in the instant case there was no expert testimony presented to the jury. The court's second opinion in Blackman, is, therefore, inapposite to this case.

740 F.Supp. 842, 845 (S.D.Fla. 1990) (same). Thus, Courts have required the United States to trace the proceeds to the illegal activity. Hence, the Government was required in the instant case to trace the funds used to purchase the subject property to some form of illegal activity. The Government failed to meet this burden. Accordingly, the trial court should have granted the defendant's motion for acquittal on the money-laundering counts. This Court should, therefore, reverse the money-laundering convictions.

The Court of Appeals cites the fact that cash was found at Munoz's home at the time of his arrest to prove that Munoz purchased property with proceeds of unlawful activity. Op. at 17. The property that is the subject of the money-laundering convictions consisted of a home purchased in December 1986 (Tr. 238), a 1984 Dodge Ram Charger purchased in February 1987 (Tr. 252-3), and a 1987 Nissan Sentra purchased in January 1988 (Tr. 256). The cash discovered at Munoz's residence was discovered on September 14, 1988 (Tr.

199-201). The cash discovered in September 1988, therefore, in no way proves that Munoz violated the money-laundering statute in 1987 and 1988. First, the Government was unable to trace the monies discovered at Munoz's residence to some unlawful activity. No evidence was presented at trial that proved that any of the cash found at Munoz's house derived from unlawful activity. Further, the fact that monies were discovered in September 1988 could not prove that the property purchased in 1987 and early 1988 was paid for with proceeds of unlawful activity. The Government must prove that, when Munoz purchased his house and two cars, he purchased them with proceeds from unlawful activity. All the Government could prove was that these items were purchased with cash. The Government offered no evidence that proved that the cash used by Munoz to purchase these items derived from unlawful activity.[13]

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[13] The only evidence that the Government can cite in support of the convictions for money laundering is the fact that Munoz had a limited (continued...)

Even though the Government offered no evidence that the property in question was purchased with the proceeds of unlawful activity, Munoz offered evidence that conclusively proved that these properties were *not* purchased with the proceeds of unlawful activity. The only evidence adduced at trial conclusively established that Munoz purchased the property in question with inheritance money he received. This evidence established that Munoz received $36,000 in inheritance after his mother died. (Tr. 380, 385). The evidence further established that Munoz used this money to purchase the two automobiles and pay the down payment on the house. (Tr. 337, 380, 385). The only evidence presented at trial regarding the source of the cash used to purchase the house and the two cars, therefore, proves conclusively that the source of

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[13] (...continued)
income. This evidence is legally insufficient. See United States v. Blackman, 897 F.2d 309, 316-17 (8th Cir. 1990) (stating that "the Government cannot rely exclusively on proof that a defendant charged with proceeds from an unlawful activity has no legitimate source of income").

funds used to purchase the cars and for the down payment on the house was the inheritance money, not illegal activity. Thus, even accepting all the Government's evidence as true on a sufficiency challenge, the trial court should have acquitted Munoz of the money-laundering convictions. Because the Government failed to carry its burden that the property in question was purchased with the proceeds of unlawful activities, the money-laundering conviction cannot stand.

B. The United States failed to prove that Munoz had the necessary intent to violate the money-laundering statute.

Finally, the Government failed to produce any evidence in support of the final element of the statute; that, at the time Munoz purchased the properties, he intended to use the properties to carry on a specified unlawful activity. There is no evidence in the record tending to support this allegation. On this basis, the Government failed to meet its burden of proof. In sum, the money-laundering convictions are not supported by legally

sufficient evidence. Consequently, this Court should grant the petition for writ of certiorari.

VI. Whether Munoz's Sixth Amendment Rights Under the United States Constitution Were Violated Because He was Denied Effective Assistance of Counsel?

Munoz was denied effective assistance of counsel in the trial court and, therefore, his Sixth Amendment rights were abrogated.

The Sixth Amendment guarantees every criminal defendant the right to representation by counsel. See U.S. CONST. amend. VI (1987). Courts have long recognized that this Amendment guarantees not only the right to counsel, but also the right to "effective" counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984). The Supreme Court wisely reasoned that the right to counsel is meaningless if that right did not also guarantee the right to effective counsel. Thus, a defendant who is denied effective assistance of counsel is denied his or her rights under the Sixth Amendment and is entitled to a retrial with effective counsel. See id. at 686.

In order to prove ineffective assistance of counsel, Munoz must prove that his counsel's representation fell below an objective standard of reasonableness and that the counsel's ineffective assistance made a difference to the presentation of his case. See Strickland, 466 U.S. at 690-95; Smith v. Puckett, 907 F.2d 581, 584 (5th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 694 (1991). In the present case, Munoz can meet this burden. Munoz was represented at trial by Tali Villafranca ("Villafranca"). Munoz will show that Villafranca's representation at trial was inadequate and that this ineffective representation made a significant difference to Munoz's trial.

This case involves several allegations, many of which were very complex. Munoz was indicted on eleven counts, alleging violations of three statutes and several subsections. One of the statutes, the money-laundering statute, was a new statute at the time of the indictment. Even the trial court candidly stated that he did not fully understand the statute (Tr. 5-6), even though he

played a role in its drafting. (Tr. 480-482). In short, this was a very complex case that required a great deal of investigation and preparation. Villafranca, however, failed adequately to investigate and prepare this case.

Villafranca was retained by Munoz on November 8, 1988. (R. 54). On November 14, 1988, less than one week later, Villafranca announced that he was ready for trial. (R. 54-55). Clearly, Villafranca did not conduct sufficient pretrial investigation into the allegations made against Munoz; he could not investigate these allegations, prepare the case for trial and announce ready for trial in less than a week. Failure to properly investigate the allegations made against the defendant is a sufficient basis upon which to find ineffective assistance of counsel in violation of the Sixth Amendment. See Cook v. Lynaugh, 821 F.2d 1072, 1078-79 (5th Cir. 1987). Villafranca's failure to properly investigate the allegations made against Munoz, therefore, denied Munoz of his right to

effective assistance of counsel under the Sixth Amendment of the United States Constitution.

Villafranca also failed to make any pretrial motions. The record on appeal does not show any pretrial discovery conducted by Villafranca. For example, Villafranca did not determine the evidence the Government intended to introduce at trial as provided for in Rule 12(d). See Fed. R. Crim. P. 12(d) (1986). Further, Villafranca did not request the documents and tangible objects that the Government was going to use at trial. See Fed. R. Crim. P. 16(b) (1986). It is impossible to properly prepare a case of this nature without conducting *any* pretrial discovery. This omission is a further indication that Villafranca did not adequately investigate and prepare this case. Villafranca's failure to investigate the allegations made in this case and failure to properly prepare for trial were apparent throughout the record. The sum of the errors and omissions made by trial counsel in this case denied Munoz of effective counsel and prejudiced his case.

Villafranca did not notice that Munoz was charged on a defective indictment. The United States alleged that Munoz violated section 922(g) and it sought sentencing under section 924(a)(1)(B). (R. 163-69). Section 924(a)(1)(B), however, does not apply to convictions rendered under 922(g); rather, Munoz should have been indicted under 924(a)(2). Moreover, the Petitioner was indicted under 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) for distribution of seven grams of cocaine. (R. 163). Subsection (b)(1)(b) does not apply to distribution of seven grams; Petitioner should have been indicted under subsection (b)(1)(C). Villafranca never noticed this defect, and the trial court had to bring it to his attention. (Tr. 475-76). In short, Villafranca's preparation of this case was so poor that he never confirmed that Munoz was convicted and indicted under the correct provisions of the statutes.

Further, much of the evidence introduced at trial had no relevance to the issues tried in this case. For example, the United States introduced

items sometimes referred to as "drug paraphernalia" that were seized during the searches of September 14, 1988. (Tr. 172-73, 197-201, 213-216, 230-235). These items, however, did not bear on any of the issues involved in this case. Munoz was not charged with possession of any of these items and the introduction of this evidence was not relevant to any of the allegations made against him. This evidence was, however, very prejudicial to Munoz. Nevertheless, Villafranca failed to object to the introduction of this evidence. Although the Court usually gives deference to the tactical decisions of trial counsel, Villafranca's failure to object to the introduction of this evidence was not a tactical decision, it was an omission based on a failure to properly prepare this case and a failure to understand the allegations made against Munoz.

Villafranca also failed to raise the defense of double jeopardy at the trial court. As stated earlier, Munoz was subjected to double jeopardy in

two instances.[14] Villafranca, however, failed to raise a double jeopardy defense in the trial court. Villafranca also failed to object to the court's charge on double jeopardy or to object to the court's sentence in light of the double jeopardy. Moreover, the trial court even suggested to Villafranca that Munoz was being charged twice for the same offense. (Tr. 4-5). Despite this suggestion, Villafranca never raised the defense. Villafranca's failure to raise this defense violated Munoz's constitutional rights to effective assistance of counsel. See Murphy v. Puckett, 893 F.2d 94, 95 (5th Cir. 1990) (holding that failure to raise double jeopardy defense constitutes

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[14] Munoz was sentenced twice for the same offense. Munoz was sentenced for possession of a firearm in violation of section 922(g) and was sentenced for possession of a firearm in violation of section 922(g) under section 924(e). (R. 90, 163-169). Second, Munoz was convicted twice for the same offense, possession of a firearm. Munoz was first convicted as a felon in possession under section 922(g)(1) and an illegal alien in possession under section 922(g)(5). (R. 90, 163-169). Munoz was clearly exposed to double jeopardy in violation of his constitutional rights.

ineffective assistance of counsel under the standards set forth in Strickland v. Washington).

Indeed, one of Villafranca's errors at trial severely prejudiced Munoz's right to a fair trial. Munoz was charged with violating 18 U.S.C. § 924(e), a sentence enhancement statute for three-time convicted felons. Munoz stipulated that he was a three-time convicted felon within the meaning of Section 924(e). (Tr. 124-25). Because of the stipulation, there was no need for the Government to introduce evidence of the prior convictions: the introduction of such evidence could be only for the purpose of inflaming the jury. Nevertheless, the superceding indictment, which contains detailed references to all three prior offenses, was given to the jury during deliberation. (Tr. 475).

In United States v. Quintero, 872 F.2d 107 (5th Cir. 1989), the Court faced a substantially similar situation. In Quintero, the defendant was charged with a violation of Section 924(e). The Quintero defendant also stipulated to the prior offenses. Id. at 109. In Quintero, the defendant moved to

dismiss the portions of his indictment referring to the prior offenses, arguing that such evidence was only relevant to sentencing. The trial court refused to dismiss these portions of the indictment and allowed the jury to take the indictment with them during deliberations. Id. On appeal, the Court held "the additional felony convictions were not an element of the offense charged and should not have come before the jury." Id. at 110.

The same reasoning applies with equal force in this case. The evidence regarding Munoz's prior convictions was not an element of any offense for which he was charged, and such evidence should not have come before the jury. By introducing this evidence to the jury, Munoz's rights to a fair trial were prejudiced. On this basis, he is entitled to a new trial and respectfully requests this Court to reverse his convictions and remand for a new trial.

Further, Villafranca did not object to the introduction of this evidence to the jury.[15] Villafranca made no objection to the fact that the indictment contained references to the prior offenses, even though the prior offenses were not part of the charged offense and even though he had stipulated to these offenses. There was no reason for the jury to have with it, during deliberations, documents referring to Munoz's prior convictions. Despite the obvious effect of these documents on the jury, Villafranca failed to have these portions of the indictment dismissed. Villafranca's ineptness clearly prejudiced Munoz's rights to a fair trial with effective counsel.

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[15] The Government may argue that Munoz waived his right to assert prejudice based on the introduction of the indictment to the jury because Villafranca did not object at trial. Because Munoz's failure to object was based on a violation of his constitutional rights, the Government cannot use this in support of its argument that Munoz waived his right to assert this error. See Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (holding that Government may not punish an individual for exercising his constitutional rights). To allow otherwise would allow the Government to take unfair advantage of the violation of Munoz's constitutionally guaranteed rights.

Courts have previously ruled that it will address Sixth Amendment violations based on ineffective assistance of counsel when the appellate record permits evaluation of the claim. See United States v. Phillips, 664 F.2d 971, 1040 (5th Cir. 1981), cert. denied sub nom, Meinster v. United States, 457 U.S. 1136 (1982). Clearly, therefore, this Court has the power and authority to address Munoz's claims that he was denied his right to effective assistance of counsel. Given the gravity and severity of the errors and omissions made by Munoz's trial counsel, this Court should exercise that power and authority and remand this case to the district court for a new trial at which Munoz can be given effective assistance of counsel.

In short, Villafranca made a series of errors and omissions at Munoz's trial, the sum of which denied Munoz his constitutionally guaranteed right to effective assistance of counsel. The Court of Appeals did not reach the issue of whether Villafranca's representation of Munoz was

ineffective; the lower court ruled that the record did not permit evaluation of the Sixth Amendment violation.[16]

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[16] To argue, as the Court of Appeals did, that the Sixth Amendment claim was not raised before the district court misses the point. The Government cannot expect Munoz's trial counsel, Villafranca, to raise this issue before the trial court and, therefore, impugn himself. After trial, Villafranca ceased representing Munoz. (R. 15). Munoz, therefore, was represented pro se, until the undersigned was appointed to represent him. One cannot reasonably expect that a pro se defendant, incarcerated in a federal penitentiary, who speaks no English, should have raised this issue before the trial court and that his failure to do so bars this Court from addressing the issue. Courts have traditionally given more leeway to pro se parties. See, e.g., Schovest v. Whitley, 927 F.2d 205, 208 (5th Cir. 1991) ("pro se cases generally are governed by more forgiving standards of pleading than cases in which the person is represented by counsel..."); Vaughn v. Estelle, 671 F.2d 152, 153-4 (5th Cir. 1982). Because of the inherent injustice of such a result, this Court should address Munoz's Sixth Amendment violation.

## CONCLUSION

For all the reasons stated herein, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Attorneys of Record
for Petitioner
Francisco Javier Munoz-Romo

NO.

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UNITED STATES SUPREME COURT

October 1991

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FRANCISCO JAVIER MUNOZ-ROMO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX

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## APPENDIX

1. Order Denying Motion for Rehearing

2. Opinion from the Court of Appeals

3. Order Granting Leave to Proceed in Forma Pauperis on Appeal, Granting Movant's Request for Transcripts, Referring Movant's Request for Court-Appointed Counsel and Staying § 2255 Motion

4. Notice of Appeal

5. Judgment Including Sentence under the Sentencing Reform Act

6. Sentencing Order

7. Verdict of the Jury

8. Superseding Indictment

## CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petitioner Francisco Javier Munoz-Romo's Petition for Writ of Certiorari and Appendix has been forwarded to the Solicitor General, Department of Justice, Washington, DC 20530 the on this the 13th day of February, 1992, by certified mail, return receipt requested.

Marc D. Murr/abd

Marc D. Murr

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APPENDIX NO. 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 89-2345

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO JAVIER MUNOZ-ROMO,

Defendant-Appellant.

---

Appeal from the United States District Court
for the Southern District of Texas

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ON PETITION FOR REHEARING
( December 3, 1991 )

Before DAVIS and BARKSDALE, Circuit Judges, and MENTZ, District Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

ENTERED FOR THE COURT:

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United States Circuit Judge

* District Judge of the Eastern District of Louisiana sitting by designation.

APPENDIX NO. 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 89-2345

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO JAVIER MUNOZ-ROMO,

Defendant-Appellant.

---

Appeal from the United States District Court
for the Southern District of Texas

---

( November 5, 1991 )

Before DAVIS and BARKSDALE, Circuit Judges, and MENTZ, District Judge.[1]

BARKSDALE, Circuit Judge.

Double jeopardy is the principal issue in this appeal. Review of several issues is limited by the failure to raise them in the district court.

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[1] District Judge of the Eastern District of Louisiana sitting by designation.

Although Francisco Javier Munoz-Romo does not appeal his convictions on two counts of cocaine distribution, he does challenge them on several counts of illegal firearms possession and money laundering. He also contends that the was improperly sentenced twice for one of the firearms offenses. We AFFIRM the convictions, and, with respect to the sentence, AFFIRM IN PART and VACATE IN PART.

I.

Since late 1987, Munoz-Romo had been the subject of an ongoing drug trafficking investigation by several federal and state agencies. A government informant, wearing a wireless microphone transmitter monitored by the Victoria, Texas, police, purchased a total of 14 grams of cocaine from Munoz-Romo on August 30 and 31, 1988.

On September 14, 1988, search warrants were issued for property owned or rented by Munoz-Romo in Victoria. The first locale searched was a house he

rented on East Warren Street. Munoz-Romo and his wife were present during the search. Law enforcement officers discovered a RG revolver hidden in a maroon suitcase in the bathroom. Approximately $59,000 in cash was found throughout the house.[2] A set of scales and a bottle of lactose were also seized.

The second location searched was an apartment registered to Munoz-Romo on Sherwood Avenue. An Excam revolver was discovered between the mattress and box springs of the bed in the bedroom. Two empty bottles of lactose were found; and, other items of drug paraphernalia were seized, including a Triple Beam Balance scale, a small mirror, a razor blade, a soda straw, and a "coke spoon". Officers also discovered a plastic cooler, containing jewelry

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[2] The agents found $11,400, $9,030 and $30,020 hidden in the rafters of the utility room ceiling, $4,827 hidden under a mattress in the master bedroom, $1,510 in the pocket of a pari of pants on the bedroom floor, and $2,074 in the top dresser drawer in the bedroom.

and several thousand dollars, buried in the ground behind the apartment. Law enforcement officials also searched a house Munoz-Romo owned on North Wheeler Street, seizing various tax records of Munoz-Romo and his wife.

In early October 1988, Munoz-Romo was charged in a two-count indictment for distribution of the cocaine sold on August 30 (count 1) and 31 (count 2), in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). Later that October, an 11-count superseding indictment was filed against him. In addition to the two distribution charges, he was charged with (1) being a felon in possession of the Excam revolver (count 3) and the RG revolver (count 5), in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(1)(B), as well as being an illegal alien in possession of the revolvers (counts 4 and 6), in violation of 18 U.S.C. §§ 922(g)(5) and 924(a)(1)(B); (2) being in possession of the RG revolver while having previously been convicted of

three drug offenses, each punishable by a term of imprisonment exceeding ten years, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (count 7); and (3) money laundering in the purchase of the North Wheeler Street residence (count 8), a Dodge truck (count 9), and Nissan (count 10) and Chevrolet (count 11) automobiles, in violation of 18 U.S.C. § 1956(a)(1)(A).

A jury trial was conducted in December 1988. At the close of the government's case, Munoz-Romo moved for a judgment of acquittal on all counts. The government agreed that it had not met its burden of proof on count 11 (money laundering in the purchase of the Chevrolet). The motion was granted on that count, but denied as to the remainder. However, after presentation of all evidence, including Munoz-Romo testifying, he did not renew the acquittal motion. The jury returned a verdict of guilty on the remaining ten counts.

A sentencing hearing was held in February 1989. Munoz-Romo was sentenced to 240 months' imprisonment on each of the counts 1, 2, 8, 9, and 10 (cocaine distribution and money laundering) (the first set), with the sentences to run concurrently with each other. He was sentenced to 22 months' imprisonment on each of counts 3, 4, 5, and 6 (firearms possession), with the sentences to run concurrently with each other, and to run concurrently with the sentences on the first set. He was further sentenced to 180 months on count 7 (firearms (RG revolver) possession enhancement), with the sentence to run concurrently with all other sentences, resulting in a total imprisonment of 240 months. He also received supervised release terms of five years each on counts 1, 2, 8, 9, and 10, and three years each on counts 3, 4, 5, 6, and 7, with all terms to run concurrently. Finally, he was ordered to pay a $50 special assessment on each of the ten counts, for a total of $500. He made no objections at the

sentencing hearing, nor were any objections to the presentence investigation report (PSI) filed. Munoz-Romo timely appealed.[3]

II.

As noted, Munoz-Romo does not appeal his convictions or sentences (concurrent terms of 240 months) on the two counts of cocaine distribution. He contends that (1) his convictions concerning each of the two revolvers for the single

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[3] The notice of appeal was filed in March 1989; however, this court dismissed the appeal that June, due to his failure to order the transcript. Later that June, Munoz-Romo filed a motion in this court for reinstatement of his appeal. He then filed motions in the district court to proceed in form pauperis, for appointment of counsel on appeal, and for the court to supply a transcript at government expense. And, in August 1989, he filed a motion in the district court under 28 U.S.C. § 2255, contending that, because his trail counsel declined to represent him on appeal, he had been denied effective assistance of counsel on appeal. In January 1991, the magistrate judge gratned the motions to proceed in forma pauperis and for a court supplied transcript, referred the request for court appointed counsel on appeal to this court, and stayed the § 2255 motion pending disposition of the direct appeal to this court. In February 1991, this court reinstated the appeal, and, in March, granted the motion for appointment of appellate counsel.

act of possession of each firearm as both a convicted felon and an illegal alien subjected him to double jeopardy, (2) there was insufficient evidence to support his convictions for the firearms and money laundering offenses, (3) he received ineffective assistance of counsel at trial, (4) comments by the trial judge to him and his counsel substantially prejudiced his right to a fair trial, and (5) he was erroneously sentenced twice for possession of the RG revolver as a felon under 18 U.S.C. §§ 922(g)(1) and 924(e).

A.

Among other things, the Double Jeopardy Clause of the Fifth Amended "'protects . . . against multiple punishments for the same offense.'" *Albernaz* v. *United States*, 450 U.S. 333, 343 (1981) (quoting *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969)). Munoz-Romo was convicted of two violations each of 18 U.S.C. §§ 922(g)(1) and 922(g)(5), which provide:

> It shall be unlawful for any person--
>
> (1) who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year; [or]
>
> * * * *
>
> (5) who, being an alien, is illegally or unlawfully in the United States;
>
> * * * *
>
> to . . . possess in or affecting commerce, any firearm . . . .

Munoz-Romo contends that these two provisions proscribe the same offense -- possession of a firearm. Therefore, he maintains that, because he was convicted of possession of each firearm as both a convicted felon and an illegal alien, he was improperly subjected to multiple punishments for a single offense as to each revolver.

Although his contentions are generally framed as a double jeopardy challenge, Munoz-Romo is essentially contending that counts 3 and 4 (possession as felon and illegal alien of Excam revolver), and 5 and 6 (possession as a felon and

illegal alien of RG revolver), are multiplicious. "'Multiplicity' is charging a single offense in more than one count in an indictment. Accordingly, it 'addresses double jeopardy; and where the jury is allowed to return convictions on multiplicious counts, the remedy is to remand for resentencing, with the government dismissing the count(s) that created the multiplicity.'" *United States v. Lemons*, 941 F.2d 309, 317 (5th Cir. 1991) (quoting *United States v. Moody*, 923 F.2d 341, 347 (5th Cir. 1991)). "'The chief danger raised by a multiplicious indictment is the possibility that the defendant will receive more than one sentence for a single offense.'" *Lemons*, 941 F.2d at 317 (quoting *United States v. Swain*, 757 F.2d 1530, 1537 (5th Cir.), *cert. denied*, 474 U.S. 825 (1985)).

Munoz-Romo did not raise the double jeopardy (or multiplicity) issue in the district court. "Multiplicity of an indictment must be raised as a defense pursuant to Fed. R. Crim. P. 12(b) to be

preserved for appeal." *United States v. Stovall*, 825 F.2d 817, 821 (5th Cir. 1987) (citing *United States v. Gerald*, 625 F.2d 1291, 1300 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981)). "Failure to object to an indictment on grounds of multiplicity prior to trial constitutes a waiver of that objection." *Lemons*, 941 F.2d at 316 n.4. *Accord United States v. Marroquin*, 885 F.2d 1240, 1245 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1807 (1990). This failure precludes Munoz-Romo from challenging his firearms convictions as multiplicious.

Despite this waiver, "[a] complaint about multiplicity of sentences . . . can be raised for the first time on appeal." *Stovall*, 825 F.2d at 821. But, if the sentences are to be served concurrently, a defendant is still precluded from asserting a multiplicity claim not raised prior to trail. *Marroquin*, 885 F.2d at 1245. However, if monetary assessments under 18 U.S.C. § 3013 are

imposed on separate counts of conviction, the sentences on those counts are not concurrent, and the concurrent sentence doctrine does not apply. *Ray v. United States*, 481 U.S. 736, 736-37 (1987); *Marroquin*, 885 F.2d at 1245. As noted, the district court imposed a $50 assessment against Munoz-Romo on each count of conviction. Accordingly, Munoz-Romo has not waived his right to challenge on appeal the alleged multiplicity of these sentences.

In *United States v. York*, 888 F.2d 1050, 1058 (5th Cir. 1989), this court stated that, "[i]n order to determine whether Congress intended to authorize multiple punishments under violations of two different statutes for the same criminal act, 'our starting point must be the language of the statutes. Absent a 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" (quoting *Albernaz*, 450 U.S. at 336). In applying this rule, the *York* court then stated:

The Supreme Court has directed us to apply the *Blockburger* rule of statutory construction to the language:

> In *Whalen* [*v. United States*, 445 U.S. 684, 691 (1980)], the Court explained that the 'rule of statutory construction' stated in *Blockburger* [*v. United States*, 284 U.S. 299 (1932),] is to be used 'to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively.' The Court then referenced the following set forth in *Blockburger*:
>
> > The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, *is whether each provision requires proof of a fact which the other does not.*

888 F.2d at 1058 (quoting *Albernaz*, 450 U.S. at 337 (citing *Blockburger*, 284 U.S. at 304)) (citations omitted) (emphasis added). Next, and as had the Supreme Court, the *York* court cautioned again that the *Blockburger* test does not control in the face

of clearly expressed contrary legislative intent. *Id.*

We are not dealing with two statutes. Two provisions (indeed, subparts of a subsection) in the same statute are in issue. This, of course, does not affect our review. *E.g.*, *United States v. Nation*, 832 F.2d 71, 73 (5th Cir. 1987) (upholding multiple punishments under different subsections of 18 U.S.C. § 922); *United States v. Luis-Gonzalez*, 719 F.2d 1539, 1546-47, 1548 (11th Cir. 1983) (upholding multiple convictions and punishments for separate violations of four subsections of 21 U.S.C. § 955a). In applying the above described analysis from *York*, we note, first, that the plain wording of § 922(g) permits the multiple punishments in issue. There is no indication in the statute that only one conviction is permitted under it, even if the same weapon is in issue on

separate charges under each of its seven subparts.[4]

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[4] Section 922(g) provides:

It shall be unlawful for an person --

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one years;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802));

(4) who has been adjucted as a mental defective or who has been committed to a mental institution;

(5) who, being an alien, is illegally or unlawfully in the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions; or

(7) who, having been a citizen of the United States, has renounced his citizenship;

(continued...)

Second, our review of the legislative history reveals no express legislative intent that § 922(g) does not permit multiple punishments for the same possession, nor are we cited to any. Third, as discussed below, the *Blockburger* rule permits the punishments imposed. As stated in *Stovall*, "[i]f both offenses require proof of a fact not necessarily required by the other then *Blockburger* is satisfied and sentences under each statutory provision may be constitutionally imposed even though there is a substantial overlap in the proof offered to establish the crimes." 825 F.2d at 822.

In *United States v. Nation*, this court addressed an argument similar to that raised by Munoz-Romo. Nation was convicted twice for a

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[4] (...continued)
to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

single act with the same firearm: shipping and transporting a firearm by a convicted felon, in violation of § 922(g)(1), and shipping and transporting a stolen firearm, in violation of 18 U.S.C. § 922(i). 832 F.2d at 72. Noting that *Blockburger* standard controlled Nation's contentions, the *Nation* court undertook to determine "whether each violation requires proving a fact that the other does not." *Id.* (citing *Ball v. United States*, 470 U.S. 856 (1985)). The court stated:

> In analyzing Nation's convictions, we find that different elements of proof are required for each conviction. Under section 922(g)(1), the government must prove not only that Nation transported the firearm between states, but also that Nation was a *felon*. Under section 922(i), however, the government must prove that Nation transported the firearm while *knowing* it was stolen. Thus, these multiple convictions involve proving distinctly different elements and, under the *Blockburger* test, cumulative sentences would certainly seem allowable.

832 F.2d at 73 (emphasis in original).[5]

---

[5] The *Nation* court noted that previous decisions of this court had precluded cumulative sentences for a "single act" uder the firearm statutes. 832 F.2d at 74. For example, in *United States v. McDaniel*, 550 F.2d 214, 219 (5th Cir. 1977), it held that cumulative sentences could not be imposed for violation of statutory provisions prohibiting possession of an unregistered firearm and possession of a firearm with an obliterated or unidentified serial number because "possession of a firearm with an obliterated [unidentified] serial number necessarily entails possession of an unregistered firearm . . . . " *Cf. Rollins v. United States*, 543 F.2d 574 (5th Cir. 1976) (same). Additionally, in *United States v. Hodges*, 628 F.2d 350, 352 (5th Cir. 1980), it held that cumulative sentences could not be imposed for statutes proscribing receipt of a firearm by a felon and possession of a firearm by a felon because receipt of a firearm was tantamount to possession. *See also Ball v. United States*, 470 U.S. 856, 862 (1985) ("proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession") (emphasis in original); *United States v. Thomas*, 810 F.2d 478, 478 (5th Cir.), *cert. denied*, 482 U.S. 930 (1987) (following *Ball*).

*Nation*, however, distinguished these cases, finding that, in each, "proof of one offense constituted proof of the other." 832 F.2d at 74. In other words, "proof that the felon received a firearm was tantamount to providng that the felon possessed the firearm"; similarly, "proof that a defendant possessed a firearm with an obliterated serial number was proof in fact that the defendant possessed an unregistered firearm since a serial

(continued...)

Similarly, under § 922(g)(1), the government must prove not only that Munoz-Romo was in possession of a firearm, but also that he was a felon. And, under § 922(g)(5), in addition to the element of possession, the government must prove that he was an alien residing in the United States illegally. "[E]ach provision requires proof of an additional fact which the other does not."

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[5] (...continued)
number was required for registration." *Id.* With respect to the facts before it, however, the *Nation* court found that "proving that the gun transported in interstate commerce was stolen does not prove that it was transported in interstate commerce by a felon; proof of additional facts and a different element are required." *Id.* Under *Blockburger*, therefore, the court found that its holding did not conflict with the previous holdings discussed above. *Id.*

As in *Nation*, proof that Munoz-Romo possessed the firearms as a convicted felon is not proof that he possessed them as an illegal alien. "[P]roof of additional facts and a different element [is] required." 832 F.2d at 74. The facts presented in this appeal, therefore, are controlled by our holding in *Nation*, rather than in *McDaniel*, *Rollins*, or *Thomas*.

*Blockburger*, 284 U.S. at 304. The sentences are not multiplicious.

B.

Munoz-Romo contends that there is insufficient evidence to support his convictions on the firearms and money laundering offenses. He maintains, therefore, that the district court erred in not granting his motion for a judgment acquittal. However, although he moved for a judgment of acquittal after the government rested its case, he failed to renew his motion at the close of the proof, following the presentation of his case, including his testimony, and the government's rebuttal witnesses. "This failure waived any objection to the denial of his motion." *United States v. Ruiz*, 860 F.2d 615, 617 (5th Cir. 1988).

"Consequently, this [c]ourt's review is not under the usual standard of review for claims of insufficiency of evidence but rather under a much stricter standard." *Id.* "We are limited to the

determination of 'whether there was a manifest miscarriage of justice.' Such a miscarriage would exist only if the record is 'devoid of evidence pointing to guilt,' or . . . 'because the evidence on a key element of the offense was so tenuous that a conviction would be shocking.'" *Id.* (quoting *United States v. Ivory*, 468 F.2d 613, 614 (5th Cir. 1972) and *United States v. Bullock*, 551 F.2d 1377, 1385 (5th Cir. 1977)). "In making this determination, the evidence, as with the regular standard for review for insufficiency of evidence claims, must be considered 'in the light most favorable to the government, giving the government the benefit of all reasonable inferences and credibility choices.'" *Ruiz*, 860 F.2d at 617 (quoting *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1348 (5th Cir. 1988)). *Accord United States v. Shaw*, 920 F.2d 1225, 1230 (5th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 2038 (1991).

1.

Munoz-Romo contends that there was insufficient evidence to prove that he knowingly possessed the RG and Excam revolvers found at the East Warren Street residence and the Sherwood Avenue apartment respectively. "Possession may be either actual or constructive." *United States* v. *Smith*, 930 F.2d 1081, 1085 (5th Cir. 1991). In *Smith*, which also involved illegal possession of firearms, we stated that "'[c]onstructive possession' has been defined as ownership, dominion, or control over the contraband itself, or dominion or control over the premises in which the contraband is concealed." *Id.* (emphasis in original). "The 'proof that possession of contraband is knowing will usually depend on inference and circumstantial evidence.'" *United States* v. *Romero-Reyna*, 867 F.2d 834, 836 (5th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1818 (1990) (quoting *United States* v. *Richardson*, 848 F.2d 509, 514 (5th Cir. 1988)).

The evidence established that Munoz-Romo was renting the Warren Street residence, and was present when the search warrant was executed there. Moreover, he testified that he was living in the house at the time. A special agent with the IRS's Criminal Investigation Division testified that, four days before execution of the warrant, he observed Munoz-Romo entering the Warren Street residence carrying a suitcase that was maroon in color and similar in appearance to the one in which the RG revolver was later discovered. Further, the revolver was found in the bathroom -- a location that "[o]ne could reasonably infer . . . [was] conveniently accessible to [Munoz-Romo]." *Smith*, 930 F.2d at 1086.

Regarding the Sherwood Avenue apartment, Mary Miller, the apartment manager, testified that Munoz-Romo had rented the apartment. Miller further testified that, two days before execution of the search warrant, Munoz-Romo had paid his monthly rent

in advance. Munoz-Romo admitted that he did so, and, further, acknowledged that he had been the one to secret the money and jewelry in the cooler buried behind the apartment. And, the Excam revolver was found between the box springs and mattress of the bed, a location easily accessible to Munoz-Romo.

In short, the record is far from being "'devoid of evidence pointing to guilt.'" *Ruiz*, 860 F.2d at 617 (citation omitted). Munoz-Romo clearly exercised dominion and control over both the Warren Street residence and the Sherwood Avenue apartment. The jury could, therefore, reasonably infer that he had constructive possession of the firearms discovered in both locations. Needless to say, there has not been a "'manifest miscarriage of justice'" on this issue. *Id.* (citations omitted).

2.

Pursuant to 18 U.S.C. § 1956, Munoz-Romo was convicted of three counts of money laundering, in connection with the purchases of the North Wheeler

Street residence, a Dodge truck, and a Nissan automobile. With respect to each, the government was required to prove that he (1) knowingly conducted a financial transaction, (2) which involved the proceeds of unlawful activity, and (3) with the intent to promote or further that unlawful activity. 18 U.S.C. § 1956(a)(1)(A)(i). The unlawful activity at issue was Munoz-Romo's drug trafficking. Again, because of Munoz-Romo's failure to move for a judgment of acquittal after presentation of the evidence, we are limited to determining whether there has been a manifest miscarriage of justice.

Munoz-Romo acknowledges that the financial transactions were conducted, but contends that the government failed to prove that they involved the proceeds of unlawful activity. He maintains, erroneously, that the only evidence produced by the government concerning this element was that he had a limited income. And, citing *United States* v.

*Blackman*, 897 F.2d 309, 317 (8th Cir. 1990), he contends correctly that proof of his limited income, by itself, is insufficient to support his money laundering convictions. However, the jury is entitled to consider such proof in combination with additional evidence, such as "evidence of [a] defendant's drug trafficking" or "large sums of unexplained currency." *Id.*

As noted, the jury was presented with far more evidence of money laundering than simply Munoz-Romo's limited income. There was evidence that he engaged in drug trafficking activities during the time period that the transactions in issue were conducted. For example, Ramiro Martinez, a former co-worker, testified that he observed Munoz-Romo selling cocaine and heroin at their place of employment, and that, during the two-year period prior to the arrest, he accompanied Munoz-Romo on several trips to Houston, Texas, during which Munoz-Romo would purchase drugs for later resale. And,

the jury was entitled to consider the several items of drug paraphernalia seized at Munoz-Romo's residences as evidence of drug trafficking. For example, a special agent with the IRS's Criminal Investigation Division, testified that lactose (of which several bottles were seized at Munoz-Romo's residences) is a common cutting agent used by narcotics distributors to dilute drugs in order to increase profitability.

The jury also heard evidence that Munoz-Romo used the items purchased in these transactions in furtherance of drug trafficking activity. Martinez testified that he observed Munoz-Romo with large sums of money received from drug sales, and that he kept that money at his North Wheeler Street residence. He further testified that the trips to Houston to purchase drugs were taken in the Dodge, and, also, that he had observed Munoz-Romo dealing drugs from both the Dodge and the Nissan.

Obviously, the large amounts of currency seized at Munoz-Romo's residences were relevant to the issue of money laundering. The currency seized at the East Warren Street residence was secreted throughout the house (including the rafters of the utility room ceiling); at the Sherwood Avenue apartment, it was buried in back of the apartment. Munoz-Romo attempted to explain these funds by contending that he had received $38,000 in an inheritance from his mother in Mexico, and $18,500 from Eliseo Guzman, his former employer at a shoe repair shop.

The government, however, presented evidence refuting this claim. Eva Guzman, Eliseo Guzman's widow, testified that she was unaware of any such bequest to Munoz-Romo, and that her husband had not left any money to her or their three children when he died. Moreover, Munoz-Romo was interviewed on the day the search warrants were executed (but before any money was found) by John Brown, a revenue

agent for the IRS. Brown testified that Munoz-Romo informed him that he had received approximately $12,000 to $18,000 in an inheritance from either his mother or father one or two years previously, and that he had already spent that inheritance. Moreover, the jury was entitled to consider the implausibility of Munoz-Romo's attempts to account for the currency. "An implausible account of exculpatory events suggests that the defendant desires to obscure his criminal responsibility. A factfinder need not ignore such an implausible account; under appropriate conditions, the implausible account provides persuasive circumstantial evidence of the defendant's consciousness of guilt." *United States v. Diaz-Carreon*, 915 F.2d 951, 955 (5th Cir. 1990).

In sum, and viewing the evidence in the light most favorable to the verdict, there was, obviously, no manifest miscarriage of justice on the issue of money laundering.

C.

Munoz-Romo asserts he was denied effective assistance of counsel at trial in violation of the Sixth Amendment to the United States Constitution. However, the contention was not presented to the district court. "The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of the allegations." *United States* v. *Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987) (citing *United States* v. *McClure*, 786 F.2d 1286, 1291 (5th Cir. 1986), *cert. denied*, 484 U.S. 1075 (1988); *United States* v. *Freeze*, 707 F.2d 132, 138-39 (5th Cir. 1983)). *Accord United States* v. *Bounds*, 943 F.2d 541, ___ (5th Cir. 1991); *United States* v. *Lewis*, 902 F.2d 1176, 1180 (5th Cir. 1990).

We consider "claims of inadequate representation on direct appeal only in rare cases where the record

allow[s] us to evaluate fairly the merits of the claim." *Higdon*, 832 F.2d at 314. "To succeed on any claim of ineffective assistance of counsel, a defendant must show that: (1) the attorney's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that except for the attorney's unprofessional errors, the results of the proceeding would have been different." *United States v. Kinsey*, 917 F.2d 181, 183 (5th Cir. 1990) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). Based on this record, we cannot fairly evaluate the merits of this claim. Accordingly, we decline to address it, without prejudice to Munoz-Romo's right to raise it in a proceeding pursuant to 28 U.S.C. § 2255.[6] *Higdon*, 832 F.2d at 314; *McClure*, 786 F.2d at 1291; *Freeze*, 707 F.2d at 139.

---

[6] As noted, Munoz-Romo's § 2255 motion in the district court, alleging ineffective assistance of counsel because of his failure to appeal, was stayed pending disposition of this appeal. *See* note 3, *supra*.

D.

Munoz-Romo contends that the behavior of the trial judge established that he was "predisposed against [him]" and denied him due process under the Fifth Amendment. He asserts that the judge stated in a side bar conference that he believed Munoz-Romo was lying, and later suggested the same to the jury. However, because Munoz-Romo did not object at trial to any conduct or comments of the trial judge, we review this issue only for plain error. *See* Fed. R. Evid. 103; Fed. R. Crim. P. 52(b).

"'Plain error' is error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2032 (1991). "It is a mistake so fundamental that it constitutes a 'miscarriage of justice.'" *Id.* "Alternatively

stated, when a new . . . legal issue is raised for the first time on appeal, plain error occurs where our failure to consider the question results in 'manifest injustice.'" *Id.* And, "[e]rrors of constitutional dimension will be noticed more freely under the plain error doctrine than less serious errors." *Id.* (citing *Alexander v. United States*, 390 F.2d 101, 103 n.3 (5th Cir. 1968)).

The exchange in question is as follows:

> [DEFENSE COUNSEL]: . . . Your Honor, I'm going to object. He's arguing and badgering the witness.
>
> THE COURT: Let me see counsel up here.
>
> (Sidebar conference:)
>
> THE COURT: I'm going to permit you to continue this line of questioning. And I want to make my ruling [outside] the presence of the [jury]. Your witness is lying. Your witness has flat-out told the prosecutor that was his handwriting. And then when he got in a bind, he denied saying that.
>
> [DEFENSE COUNSEL]: I -- that's fine, your Honor. I thought that he said some of it was his handwriting and some of it --

THE COURT: Counsel, he's been through it. He said, 'Okay.' Then moments ago he said, 'Show me where that is.' Then a few moments later he admitted to that line. Then when the witness saw where [the prosecutor] was going, he said, 'Oh, some are mine, some aren't mine.' He's not being a cooperative witness. So, I'm going to let [the prosecutor] work on him a while. I thing it's only fair.

[DEFENSE COUNSEL]: That's fine, Judge.

(Open court:)

[THE PROSECUTOR:] Now, Mr, Munoz, I thought you told me a few moments ago this second number -- in fact, you read it off -- '375.00 - 1 1/2,' and then you corrected yourself to '1/2' -- did you say that was your writing a while ago?

[MUNOZ-ROMO:] Let me see it a little bit. I see that I -- my mistake now. I did say '1 1/2.' But I see that it's '1/2' now. it's been shown to be very -- and taken away very quickly.

THE COURT: Wait a minute. The record will reflect that the defendant has had ample opportunity and that the prosecutor is not taking away anything from the defendant. If the defendant would like additional time to examine the document, then he now has the time.

No. No. There's been no question put to you. You answer the prosecutor's question. He asked you a moment ago a question to which you gave an answer. It is

> his belief that you're changing your answer. And he has asked you for your explanation of what he believes to be your change. That's going to be up to the jury to decide. But he's entitled to ask his question. Please answer his question.

"To constitute constitutional error . . . the trial court's actions, viewed as a whole, must amount to intervention which could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor." *United States v. Davis*, 752 F.2d 963, 974 (5th Cir. 1985) (citing *United States v. Abrams*, 568 F.2d 411, 423-24 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978)). "In addition, such judicial intervention must be qualitatively and quantitatively substantial to meet this test." *Davis*, 752 F.2d at 974 (citing *United States v. Robinson*, 687 F.2d 359, 361 (11th Cir. 1982)).

The trial judge's comment that Munoz-Romo was lying was made outside the presence of the jury and, therefore, could not have influenced it. The response in open court to Munoz-Romo's statement

that he had not been given sufficient time to review a document did not suggest to the jury that Munoz-Romo was being untruthful. Instead, the comments advised Munoz-Romo, who was testifying through a Spanish-speaking interpreter, why the prosecutor was questioning him regarding an apparent discrepancy in his testimony. The district judge correctly noted that it was for the jury to decide whether a discrepancy existed.

This single exchange, viewed in the context of the entire record, does not amount to judicial intervention which could have led the jury to a predisposition of guilt. Furthermore, the trial court later instructed the jury:

> Do not assume from anything that I may have said or done during the trial that I have any opinion concerning any issues in this case. Except for the instructions that I give to you on the law at this moment and other moments in the trial, you should disregard anything that I may have said during the trial in arriving at your own findings as to the facts of the case.

As in *Davis*, "[s]uch a curative instruction militates against any finding of prejudice." 752 F.2d at 975. There is no error plain or otherwise.

E.

Finally, Munoz-Romo contends that his sentences as a felon in possession of the RG revolver, under § 922(g)(1) (count 5) and § 924(e) (count 7), violated his rights under the Fifth Amendment. Munoz-Romo does not contend that he was not properly subject to the § 924(e) enhancement, but only that he should not have received both a 22 month sentence for violation of § 922(g)(1) *and* an enhanced 180 month sentence under § 924(e).

As noted, however, Munoz-Romo made no objections at the sentencing hearing, nor did he object to the sentencing recommendations contained in the PSI. Therefore, once again, we review the sentence only for plain error. *Lopez*, 923 F.2d at 50. "The plain error doctrine requires parties to raise objections at procedurally opportune junctures as early in the

judicial process as possible. In the sentencing process, '[t]he guidelines do not impose the sentence, they provide a framework for a district court to impose a sentence.'" *Id.* (alteration in original) (emphasis in original) (quoting *United States v. Mejia-Orosco*, 867 F.2d 216, 219 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989)). "It [is] incumbent upon [the defendant] to make and factually develop in the district court all arguments concerning application of the guidelines he believed might persuade the judge to alter the sentence he now challenges." *Lopez*, 923 F.2d at 50.

"Section 924(e)(1) . . . establishes a minimum fifteen-year sentence for violations of § 922(g) by those who have three prior 'dangerous felony' or 'serious drug offense' convictions." *Smith*, 930 F.2d at 1089. However, § 924(e) does not create an offense separate from § 922(g), but, instead, "is intended only to provide enhanced punishment for those persons convicted under § 922(g) who also have

three previous felony convictions." *United States v. Affleck*, 861 f.2d 97, 99 (5th Cir. 1988), *cert. denied*, 489 U.S. 1058 (1989). The government concedes that Munoz-Romo should not have received separate sentences under each provision. Accordingly, and because this is a legal issue, Munoz-Romo's sentences as a felon in possession of the RG revolver under §§ 922(g) and 924(e) constitute plain error.

As noted, Munoz-Romo has not challenged the finding that he was properly subject to the enhancement provision of § 924(e). Obviously, an enhanced sentence is designed to be used instead of the regular, or shorter, sentence. Therefore, we vacate the 22 month sentence on count 5, and affirm the 180 month enhanced sentence imposed under § 924(e) on count 7. *See United States v. Bates*, 896 F.2d 912, 913 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2628 (1990) (where defendant erroneously received double sentence for bank

robbery, the sentence imposed for the most aggravated form of the bank robbery affirmed while other sentence was vacated); *Sullivan v. United States*, 485 F.2d 1352, 1355 (5th Cir. 1973) (to eliminate necessity of additional judicial work by district court, this court can vacate erroneous sentence and leave undisturbed sentence properly imposed).

III.

For the foregoing reasons, Munoz-Romo's convictions are AFFIRMED. Because we vacate his sentence on count 5, his sentence is AFFIRMED IN PART and VACATED IN PART.

APPENDIX NO. 3

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | § | |
| Plaintiff-Respondent | § | CR. No. V-88-06-01 |
| v | § | C.A. No. V-89-33 |
| FRANCISCO JAVIER MUNOZ-ROMO, | § | |
| Defendant-Movant | § | |

ORDER GRANTING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL, GRANTING MOVANT'S REQUEST FOR TRANSCRIPTS, REFERRING MOVANT'S REQUEST FOR COURT-APPOINTED COUNSEL AND STAYING § 2255 MOTION

This Court's Order striking Movant's affidavit in support of it's Motion for Leave to Proceed on Appeal *in forma pauperis* because the affidavit does not state the issues Movant will raise on appeal is WITHDRAWN.

This Court concedes that the aforementioned Order imposed an untenable burden on a pro se applicant, with little formal schooling and without assistance of counsel. Rodriguez v. United States,

395 U.S. 327, 330, 89 S.Ct. 1715, 1717, 29 L.Ed.2d. 340, 344 (1969).

It is ORDERED that Movant's Application to Proceed *in forma pauperis* on appeal is GRANTED. It is further

ORDERED that Movant's Motion for the Court to Supply Transcripts for appeal, without cost, is also GRANTED. The Clerk shall forward copies of the transcripts in this cause to Movant and to the Clerk for the Fifth Circuit Court of Appeals.

Movant's Request for Court-Appointed Counsel on Appeal is respectfully referred to the Fifth Circuit Court of Appeals for its consideration.

Movant's § 2255 motion is STAYED pending disposition of Movant's direct appeal of his conviction.

SIGNED this _____ day of January, 1991.

Eduardo E. de Ases
UNITED STATES MAGISTRATE JUDGE

APPENDIX NO. 4

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | § | |
| | § | |
| VS. | § | CR. NO. V-88-6-S |
| | § | |
| FRANCISCO JAVIER MUNOZ-ROMO | § | |

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

FRANCISCO JAVIER MUNOZ-ROMO, Defendant in the above cause, herenow on this 2nd day of March, 1989, gives notice of appeal of and from the judgment and sentence entered in the above entitled and numbered cause on March 2, 1989, to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

FRANCISCO JAVIER-MUNOZ-ROMO, PRO SE
Defendant

APPENDIX NO. 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | § | |
| | § | |
| V. | § | Case Number |
| V-88-00006-S-01 | § | |
| | § | |
| FRANCISCO JAVIER MUNOZ-ROMO | § | |
| AKA JAVIER MUNOZ | § | |
| AKA FRANCISCO ROMO MUNOZ | § | |

(Name of Defendant) Teli Villafranca
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Count Number(s) |
|---|---|---|
| 21:841(a)(1) & (b)(1)(C) | POSS W/INT TO DISTRIBUTE 7 GRAMS OF COCAINE | 1, 2 |
| 18:922(g)(1) & 924(a)(1)(B) | FELON IN POSSESSION OF FIREARM | 3, 5 |
| 18:922(g)(5) & 924(a)(1)(B) | POSSESSION OF FIREARM BY ILLEGAL ALIEN | 4, 6 |
| 18:922(g)(1) & 924(e) | POSSESSION/FIREARM BY A 3-TIME CONVICTED FELON | 7 |
| 18:1956(a)(1)(A) | CONDUCTING FINANCIAL TRANSACTION W/INT TO PROMOTE UNLAWFUL ACTIVITY | |

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) #11 and is discharged as to such count(s).

☐ Count(s) _____ (isXare) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☐ It is ordered that the defendant shall pay to the United States a special assessment of $500.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by the Judgment are fully paid.

Defendant's Soc. Sec. Number:

None _____ _____
Date of Imposition of Sentence

Defendant's mailing address:

005 N. Wheeler _____
Signature of Judicial Officer
Victoria, TX 77903 HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE
Defendant's Name & Title of Judicial
residence address: Officer
Same _____ _____
Date

_____

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED FORTY (240) MONTHS in Cts. 1, 2, 8 9 & 10, to be served concurrently to each other;

TWENTY-TWO (22) MONTHS in Cts. 3, 4, 5, & 6, to be served concurrently to each other and with Cts. 1, 2, 8, 9 & 10;

ONE HUNDRED EIGHTY (180) MONTHS IN Count 7, to be served concurrently with sentences in Cts. 1, 2, 3, 4, 5, 6, 8, 9, & 10 for a total of TWO HUNDRED FORTY (240) MONTHS.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshall for this district.

☐ at _____ a.m. p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on ___ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

Defendant: FRANCISCO JAVIER MUNOZ-ROMO
Case Number: V-88-00006-S-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

FIVE (5) YEARS, unsupervised if deported.

This term shall consist of terms of FIVE (5) YEARS as to Counts 1, 2, 8, 9 & 10; and THREE (3) YEARS as to Counts 3, 4, 5, 6 & 7. All terms of Supervised Release shall run concurrently.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this Court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. The defendant shall be prohibited from possessing a dangerous weapon;

2. The defendant shall participate in a program for the treatment of drug and/or alcohol addiction, dependency or abuse, which may include but not be limited to urine, breath, saliva and skin testing to determine whether he has reverted to the use of drugs and/or alcohol. Further, he shall participate as instructed and as deemed necessary by the U.S. Probation Officer and shall comply with all rules and regulations of the treatment agency until discharged by the program director with approval of the U.S. Probation Officer; and

3. The defendant shall be deported and remain outside the United States and shall be delivered to a duly authorized Immigration official for such deportation.

Defendant: FRANCISCO JAVIER MUNOZ-ROMO
Case Number: V-88-00006-S-01

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned buy the defendant's

criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

APPENDIX NO. 6

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | § | |
| | § | |
| V. | § | CR. NO. V-88-6-S |
| | § | |
| FRANCISCO JAVIER MUNOZ-ROMO | § | |

SENTENCING ORDER

On the 16th day of December, 19988, the Defendant was found guilty on his/her plea of guilty/by verdict of the jury. A Presentence Report is ordered and a sentencing schedule is established as follows:

1. No later than January 20, 1989, the United States Probation Office will complete a Presentence Report. It is the responsibility of counsel to obtain the PSI Report. (Rule 17B, Local Rules of Southern District of Texas.) The United States Probation Office will not advise counsel of the completion of the PSI Report.

2. No later than January 30, 1989, each counsel shall furnish a written statement to the United States Probation Office stating either that there are objections and describing them or that there are no objections. The Defendant shall also sign the defendant's statement.

3. No later than February 11, 1989, the United States Probation Office shall prepare the final Presentence Report and furnish it to the Court and the parties.

4. On THURSDAY, FEBRUARY 23, 1989, at 8:30 a.m., the Defendant will appear for sentencing.

All parties and their counsel and the United States Probation Office shall comply fully with Local Rule 17 in the completion and review of the Presentence Report.

ORDERED this 16th day of December, 1988.

_____
HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

ACKNOWLEDGED:

_____
Defendant

_____
Defendant's Counsel

_____
Asst. United States Attorney

APPENDIX NO. 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | § | |
| | § | |
| V. | § | CR. NO. V-88-6S |
| | § | |
| FRANCISCO JAVIER MUNOZ-ROMO | § | |
| a/k/a JAVIER MUNOZ, | § | |
| a/k/a FRANCISCO ROMO MUNOZ | § | |

VERDICT OF THE JURY

Verdict No. One

We, the Jury, find the Defendant FRANCISCO JAVIER MUNOZ-ROMO _____, as
("Guilty" or "Not Guilty")

charged in

Count I of the superseding indictment.

Verdict No. Two

We, the Jury, find the defendant FRANCISCO JAVIER MUNOZ-ROMO _____, as
("Guilty" or "Not Guilty")

charged in

Count II of the superseding indictment.

Verdict No. Three

We, the Jury, find the defendant FRANCISCO JAVIER MUNOZ-ROMO _____, as
("Guilty" or "Not Guilty")

charged in

Count III of the superseding indictment.

Verdict No. Four

We, the Jury, find the defendant FRANCISCO JAVIER MUNOZ-ROMO _____, as
("Guilty" or "Not Guilty")

charged in

Count IV of the superseding indictment.

Verdict No. Five

We, the Jury, find the defendant FRANCISCO JAVIER MUNOZ-ROMO _____, as
("Guilty" or "Not Guilty")

charged in

Count V of the superseding indictment.

Verdict No. Six

We, the Jury, find the defendant FRANCISCO JAVIER MUNOZ-ROMO _____, as
("Guilty" or "Not Guilty")

charged in

Count VI of the superseding indictment.

Verdict No. Seven

We, the Jury, find the defendant FRANCISCO JAVIER MUNOZ-ROMO _____, as
("Guilty" or "Not Guilty")

charged in

Count VII of the superseding indictment.

Verdict No. Eight

We, the Jury, find the defendant FRANCISCO JAVIER MUNOZ-ROMO _____, as
("Guilty" or "Not Guilty")

charged in

Count VIII of the superseding indictment.

Verdict No. Nine

We, the Jury, find the defendant FRANCISCO JAVIER MUNOZ-ROMO _____, as
("Guilty" or "Not Guilty")

charged in

Count IX of the superseding indictment.

Verdict No. Ten

We, the Jury, find the defendant FRANCISCO JAVIER MUNOZ-ROMO _____, as
("Guilty" or "Not Guilty")

charged in

Count X of the superseding indictment.

DATED: _____
Jury Foreman

APPENDIX NO. 8

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

VICTORIA DIVISION

UNITED STATES OF AMERICA *

VS. * CRIMINAL NO. V-88-6S

FRANCISCO JAVIER MUNOZ-ROMO, *
a/k/a JAVIER MUNOZ,
a/k/a FRANCISCO ROMO MUNOZ *

SUPERSEDING
I N D I C T M E N T

THE GRAND JURY CHARGES:

COUNT I

On or about August 30, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER MUNOZ, also known as FRANCISCO ROMO MUNOZ, did knowingly and intentionally distribute a quantity less than five hundred (500) grams, that is, approximately seven (7) grams, of cocaine, a Schedule II controlled substance.

[Violation: Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)]

COUNT II

On or about August 31, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER MUNOZ, also known as FRANCISCO ROMO MUNOZ, did knowingly and intentionally distribute a quantity less than five hundred (500) grams, that is, approximately seven (7) grams, of cocaine, a Schedule II controlled substance.

[Violation: Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)]

COUNT III

On or about September 14, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER ROMO, also known as FRANCISCO ROMO MUNOZ, previously having been convicted in the 24th Judicial District Court, Victoria County, Texas, on September 14, 1984, for the following three offenses: 1) Delivery of

Cocaine, Cause Number 84-6-11, 562; 2) Delivery of Cocaine, Cause Number 84-6-11, 563; and 3) Delivery of Cocaine, Cause Number 84-6-11, 564, all crimes punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce a firearm, namely, an Excam revolver, model TA76, .22 caliber, serial number C42124.

[Violation: Title 18, United States Code, Sections 922(g)(1) and 924(a)(1)(B)]

COUNT IV

On or about September 14, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER MUNOZ, also known as FRANCISCO ROMO MUNOZ, an alien illegally and unlawfully in the United States, did knowingly possess in and affecting commerce a firearm, namely, an Excam revolver, model TA76, .22 caliber, serial number C42124.

[Violation: Title 18, United States Code, Sections 922(g)(5) and 924(a)(1)(B)]

COUNT V

On or about September 14, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER MUNOZ, also known as FRANCISCO ROMO MUNOZ, previously having been convicted in the 24th Judicial District Court, Victoria County, Texas, on September 14, 1984, for the following three felonies: 1) Delivery of Cocaine, Cause Number 84-6-11,562; 2) Delivery of Cocaine, Cause Number 84-6-11, 563; and 3) Delivery of Cocaine, Cause Number 84-6-11,564, all crimes punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce a firearm, namely, an RG revolver, model RG14S, .22 caliber, serial number Z103908.

[Violation: Title 18, United States Code, Sections 922(g)(1) and 924(a)(1)(B)]

COUNT VI

On or about September 14, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER MUNOZ, also known as FRANCISCO ROMO MUNOZ, commerce a firearm, namely an RG revolver, model RG14S, .22 caliber, serial number Z103908.

[Violation: Title 18, United States Code, Sections 922(g)(5) and 924(a)(1)(B)]

COUNT VII

On or about September 14, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER MUNOZ, also known as FRANCISCO ROMO MUNOZ, previously having been convicted in a court of the State of Texas of three serious drug offenses, all punishable by a term of imprisonment exceeding ten years, did knowingly and unlawfully possess in and affecting

commerce a firearm, namely, an RG revolver, model RG14S, .22 caliber, serial number Z103908.

Then Grand Jury further charges that Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER MUNOZ, also known as FRANCISCO ROMO MUNOZ, was heretofore duly and legally convicted of the felony offense of Delivery of Cocaine in Cause No. 84-6-11, 562 on September 14, 1984, in the 24th Judicial District Court of Victoria County, Texas;

and of the felony offense of Delivery of Cocaine in Cause No. 84-6-11,563 on September 14, 1984, in the 24th Judicial District Court of Victoria County, Texas;

and of the felony offense of Delivery of Cocaine in Cause No. 84-6-11,564 on September 14, 1984, in the 24th Judicial District Court of Victoria County, Texas.

All three of said serious drug convictions occurred prior to the offense alleged in the first paragraph of this count of the indictment.

[Violation Title 18, United States Code, Section 1956(a)(1)(A)]

COUNT IX

On or about December, 1986, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER MUNOZ, also known as FRANCISCO ROMO MUNOZ, with the intent to promote the carrying on of specified unlawful activity, to-wit: the sale and distribution of controlled substances, and knowing that property involved in a financial transaction represented the proceeds of some form of unlawful activity, did conduct and attempt to conduct such a financial transaction, that is, the purchase of a 1984 Dodge Ramcharger, serial number 1B4GD12T3ES289867, by paying $4,837.18 to the Victoria Motor Company, Victoria, Texas which purchase in fact involved the proceeds of the said specified unlawful activity.

[Violation Title 18, United States Code, Section 1956(a)(1)(A)]

COUNT X

On or about January 25, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER MUNOZ, also known as FRANCISCO ROMO MUNOZ, with the intent to promote the carrying on of specified unlawful activity, to-wit: the sale and distribution of controlled substances, and knowing that property involved in a financial transaction represented the proceeds of some form of unlawful activity, did conduct and attempt to conduct such a financial transaction, that is, the purchase of a 1987 Nissan Sentra, serial number JN1PB241XHu044148, by paying $7,200.00 to Discount Motors, Victoria, Texas, which purchase in fact involved the proceeds of the said specified unlawful activity.

[Violation Title 18, United States Code, Section 1956(a)(1)(A)]

COUNT XI

On or about May 26, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant FRANCISCO JAVIER MUNOZ-ROMO, also known as JAVIER MUNOZ, also known as FRANCISCO ROMO MUNOZ, with the intent to promote the carrying on of specified unlawful activity, to-wit: the sale and distribution of controlled substances, and knowing that property involved in a financial transaction represented the proceeds of some form of unlawful activity, did conduct and attempt to conduct such a financial transaction, that is, the purchase of a 1987 Chevrolet Cavalier, serial number 1G1JE31W3H7127413, by paying $9,100.00 to Discount Motors, Victoria, Texas, which purchase in

fact involved the proceeds of the said specified unlawful activity.

[Violation Title 18, United States Code, Section 1956(a)(1)(A)]

A TRUE BILL:

_____
FOREMAN OF THE GRAND JURY

HENRY K. ONCKEN
UNITED STATES ATTORNEY

By: _____
Assistant United States Attorney

(2)

Supreme Court, U.S.
FILED
JUN 24 1992
OFFICE OF THE CLERK

No. 91-1593

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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FRANCISCO JAVIER MUNOZ-ROMO, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

MICHAEL E. O'NEILL
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether petitioner's multiple convictions or sentences under 18 U.S.C. 922(g)(1) and (5) violated the Double Jeopardy Clause.

2. Whether the court of appeals awarded petitioner adequate relief for the wrongful imposition of sentences under both 18 U.S.C. 922(g) and 18 U.S.C. 924(e).

3. Whether the evidence at trial was sufficient to support petitioner's firearms and money laundering convictions.

4. Whether petitioner was denied effective assistance of counsel at trial.

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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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No. 91-1593

FRANCISCO JAVIER MUNOZ-ROMO, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

### OPINION BELOW

The opinion of the court of appeals, Pet. App. 64-103, is reported at 947 F.2d 170.

### JURISDICTION

The judgment of the court of appeals was entered on November 5, 1991. A petition for rehearing was denied on December 3, 1991. Pet. App. 62. The petition for a writ of certiorari was filed on January 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of two counts of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841; two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); two counts of being an illegal alien in possession of a firearm, in violation of 18 U.S.C. 922(g)(5); one count of possessing a firearm after three convictions for serious drug offenses, in violation of 18 U.S.C. 924(e); and three counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A). He was sentenced to 240 months in prison, to be followed by five years of supervised release.[1] The court of appeals affirmed the convictions but vacated a portion of petitioner's sentence. Pet. App. 102.

1. Beginning in 1987, petitioner was the subject of a narcotics investigation by state and federal law enforcement authorities. On August 29, 1988, James Linberg, who had previously purchased cocaine from petitioner, agreed to cooperate with the police in arranging a controlled purchase of cocaine from petitioner. Officers placed a wireless microphone on Linberg to record his conversations with petitioner. Linberg arranged to meet petitioner for the purpose

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[1] Petitioner was sentenced to 240 months in prison and five years of supervised release on his narcotics and money laundering convictions. He was sentenced to 22 months in prison and three years of supervised release on his convictions for being a felon in possession of a firearm and for being an illegal alien in possession of a firearm. Finally, he was sentenced to a term of 180 months in prison, to be followed by three years of supervised release, for possessing a firearm following three convictions for serious drug offenses. The prison terms and the periods of supervised release were all made to run concurrently.

of buying cocaine. Over the next two days, Linberg purchased a total of 14 grams of cocaine from petitioner. Pet. App. 65; Gov't C.A. Br. 6-8.

On September 14, 1988, law enforcement agents obtained warrants to search three properties in Houston, Texas, that were owned or rented by petitioner. Pet. App. 65-67. In their search of a house that petitioner rented on East Warren Street, the officers discovered (a) approximately $59,000 in cash hidden throughout the house; (b) a revolver and several shells in a suitcase located in the bathroom; (c) drug paraphernalia; and (d) drug ledgers. Pet. App. 66; Gov't C.A. Br. 9-10.

Federal agents executed a second search warrant at an apartment registered to petitioner on Sherwood Avenue. During their search, the agents found (a) a revolver hidden between a mattress and box spring; (b) several bags containing money and jewelry buried on the grounds of the apartment complex; and (c) several items of drug paraphernalia. Pet. App. 66-67; Gov't C.A. Br. 10-12. The same day, agents searched petitioner's house on North Wheeler Street. They seized various income tax returns of petitioner and his wife. Gov't C.A. Br. 12.

2. On appeal, petitioner argued that the Double Jeopardy Clause was violated because, for each firearm at issue, he was separately convicted of being a felon in possession of a firearm and an illegal alien in possession of the same firearm. The court of appeals noted that petitioner was claiming, in effect, that for each weapon he had been indicted on multiple counts for a single offense—unlawful possession of a firearm. Pet. App. 72-73. The court of appeals rejected that claim.

At the outset, the court noted that petitioner did not raise the double jeopardy or multiplicity issue in

the district court. The court therefore held that petitioner had waived his claim respecting multiplicitous convictions. The court further held, however, that petitioner's waiver did not extend to his multiple sentences, and that he could therefore raise his claim regarding multiplicity of sentences for the first time on appeal. Pet. App. 74.

The court noted that the challenge to the multiple sentences imposed for violations of 18 U.S.C. 922(g)(1) and 18 U.S.C. 922(g)(5) turns on whether Congress intended to authorize multiple punishments under those two statutory provisions for the same criminal act. The court concluded that the plain wording of the statute permits the multiple punishments at issue, and that the legislative history does not alter that conclusion. Citing *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court noted that each offense—being a felon in possession of a firearm and being an illegal alien in possession of a firearm—requires proof of a fact that the other does not, and concluded that the imposition of separate punishment for each offense was therefore authorized. Pet. App. 71-83.

The court of appeals also rejected petitioner's claim that there was insufficient evidence to support his convictions for possessing the two firearms and for money laundering.[2] The court first concluded that the jury could reasonably infer from the evidence that petitioner constructively possessed the firearms found at his two residences. Pet. App. 86-87. The court then sustained petitioner's convictions on the three counts of money laundering in connection with

---

[2] Because petitioner had moved for acquittal only at the conclusion of the government's case, and not again at the end of trial, the court evaluated petitioner's claims to determine whether there had been "a manifest miscarriage of justice." Pet. App. 84.

the purchases of a house, a truck, and an automobile. Petitioner claimed that the government had failed to show that those purchases were made with the proceeds of unlawful activity, arguing that the government had impermissibly rested its case exclusively on proof of his limited legitimate income. The court, however, noted that the government had shown not only that petitioner had limited legitimate sources of income, but also that he had engaged in drug trafficking and had stashed large sums of money at his residences. The court concluded that the jury was entitled to reject petitioner's efforts at trial to explain the large sums of cash that he used to make his purchases. Pet. App. 87-92.

The court of appeals declined to address petitioner's claim of ineffective assistance of counsel, because petitioner did not present that claim to the district court. The court of appeals was therefore unable to evaluate the claim properly on the record before it. The court made clear, however, that its decision was without prejudice to petitioner's right to raise his claim in a motion for collateral relief under 28 U.S.C. 2255. Pet. App. 93-94.

Finally, petitioner contended that he should not have received both a 22-month sentence under 18 U.S.C. 922(g)(1) and an enhanced 180-month sentence under 18 U.S.C. 924(e) for the same underlying possession conviction. Although petitioner failed to raise that claim in the district court, the court of appeals held that the district court had committed plain error by sentencing petitioner under both provisions. The court of appeals therefore vacated the sentence that

was imposed under Section 922(g)(1).[3] Pet. App. 100-103.

## ARGUMENT

1. Petitioner renews his contention that for each firearm at issue he was improperly convicted twice for the same offense, in violation of the Double Jeopardy Clause. Pet. 8-19. He contends that his convictions as a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), and as an illegal alien in possession of the same firearm, in violation of 18 U.S.C. 922(g)(5), violated double jeopardy principles by penalizing him more than once for possessing the same firearm.

Because petitioner did not raise this issue in the district court, the court of appeals correctly held that petitioner had waived his double jeopardy challenge to his convictions under Sections 922(g)(1) and 922(g)(5). The only issue the court of appeals reached—and thus the only issue presented in this Court—is whether the district court properly imposed separate sentences on those counts. Because the terms of imprisonment imposed on those counts were concurrent, petitioner's prison term was not affected by the entry of separate sentences on the Section 922(g)(1) and Section 922(g)(5) counts; thus, with respect to his prison terms, petitioner did not suffer the "cumulative punishment" that the Double Jeopardy Clause forbids. The sentences on the Section 922(g)(1) and 922(g)(5) counts, however, were cumulative with respect to the $50 special assessment imposed under 18 U.S.C. 3013 on each count.

" [T]he question whether punishments imposed by a court after a defendant's conviction upon criminal

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[3] Petitioner did not dispute the validity of the sentence imposed under Section 924(e). Pet. App. 100.

charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Whalen* v. *United States*, 445 U.S. 684, 688 (1980). We agree with petitioner that Congress did not authorize the imposition of cumulative punishments for violating Sections 922(g)(1) and 922(g)(5) through the possession of a single firearm. It is true that each of those provisions requires proof of an element that the other does not, and that it is therefore presumed that Congress intended to allow cumulative punishments for each offense. See *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). That presumption, however, may be overcome by "a clear indication of contrary legislative intent." *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981); see *Garrett* v. *United States*, 471 U.S. 773, 779 (1985) (*Blockburger* test must give way to "a plainly expressed contrary view on the part of Congress").

We believe that the language and structure of Section 922(g) disclose Congress's clear intent not to impose cumulative punishments when the same incident violates two subdivisions of subsection (g). The two subdivisions at issue here are found in a single subsection of a statute that prescribes a single penalty for all of those subdivisions. See *United States* v. *Winchester*, 916 F.2d 601, 605 (11th Cir. 1990) ("Under 18 U.S.C. 924(a)(2), Congress provided criminal penalties for the violation of subsection (g) of section 922, but it did not list separate penalties for the separate subdivisions of subsection (g).").[4] Moreover,

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[4] Of course, the fact that two charges are based on subdivisions of a single section or subsection of a statute is not dispositive of the question whether one offense or multiple offenses are intended. See, *e.g.*, *Callanan* v. *United States*, 364 U.S. 587 (1961) (conspiracy and substantive offense set forth in

"each subdivision of subsection (g) differs only in its requirement that the offender have a certain 'status' under the law." *Ibid.* And the statute's structure indicates that Congress sought "only to bar the possession of firearms by certain types of persons that it considered dangerous," and not to punish persons "solely for having a certain status under the law." *Id.* at 605-606. Indeed, to conclude otherwise would mean that "a convicted felon who is also a fugitive from justice, a drug addict, a 'mental defective,' and an illegal alien, could be sentenced to five consecutive terms of imprisonment for the same incident, namely, the possession of a firearm." *Id.* at 607.

Accordingly, because the text and structure of Section 922(g) clearly indicate that Congress did not intend to authorize multiple punishments under the various subdivisions of subsection (g), this Court should grant the petition, vacate the judgment, and remand the case for the court of appeals to direct the vacation of two of the sentences imposed under Section 922(g).

2. Petitioner also contends that the Double Jeopardy Clause was violated because, for one of the firearms he possessed, he was sentenced under both the felon-in-possession provision, 18 U.S.C. 922(g)(1), and the sentence enhancement provision, 18 U.S.C. 924(e), which applies when a felon in possession has had three prior convictions for violent felonies or

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18 U.S.C. 1951(a) are two separate offenses). In this case, however, the subsection in question, 18 U.S.C. 922(g), describes only a single unlawful act—possession of a firearm—which it then provides can be committed by persons having the status described in subdivisions 922(g)(1) through 922(g)(7). In that setting, it seems clear that Congress intended to describe only a single crime that could by committed by any person fitting into one or more of the seven qualifying categories.

serious drug offenses. Pet. 19-24. The government conceded below that Congress did not intend to permit sentencing to occur under both of those provisions for one offense. Gov't C.A. Br. 27. Observing that petitioner had not disputed the finding that he was subject to sentence enhancement under Section 924(e), the court of appeals left in place the sentence imposed under Section 924(e) and vacated the sentence imposed under Section 922(g)(1). Pet. App. 102.

In this Court, petitioner argues that the court of appeals should also have vacated the sentence under Section 924(e) and remanded the case to the district court for consideration of the facts relevant to the appropriateness of an enhanced sentence. But because petitioner has not disputed the validity of the enhancement under Section 924(e) either in the court of appeals or in this Court,[5] there was no reason for the court of appeals to remand the Section 924(e) sentence for further consideration. Thus, the court of appeals awarded petitioner complete relief by vacating the sentence imposed under Section 922(g)(1).

3. Petitioner renews his claim that the evidence was insufficient to support his convictions on the firearms and money laundering counts. Pet. 24-47. The standard ordinarily applicable to such claims is whether the evidence at trial could support any rational jury's finding of guilt beyond a reasonable

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[5] Petitioner claims in passing that the district court erred in sentencing him under Section 924(e) because there was insufficient evidence to sustain his underlying conviction under Section 922(g). Pet. 38. That claim, however, is not distinct from his general assertion that there was insufficient evidence that he possessed the firearms for which he was convicted. Because petitioner's insufficiency claims are without merit, see pp. 10-12, *infra*, his challenge to the sentence enhancement also does not warrant further review.

doubt. *United States* v. *Powell*, 469 U.S. 57, 67 (1984); see also *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). Because petitioner moved for a judgment of acquittal only at the conclusion of the government's case, and not at the close of trial, the court of appeals applied a stricter standard here—requiring petitioner to show that the record was so lacking in evidence that his conviction reflected a manifest miscarriage of justice. Pet. App. 83-84.[6] Under either standard of review, petitioner's convictions are adequately supported by the evidence.

a. Petitioner claims that the government failed to prove that he had constructive possession of the firearms found at his residences. Pet. 28-37. He does not challenge the court of appeals' standard for determining constructive possession of a firearm—that a defendant must have the intent and ability to exercise dominion and control over the weapon. Pet. 30 (citing *United States* v. *Smith*, 591 F.2d 1105, 1107 (5th Cir. 1979); *United States* v. *Donofrio*, 450 F.2d 1054, 1056 (5th Cir. 1971)). Rather, he claims that the evidence in this case does not support the verdict with respect to the firearms found at his residences.

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[6] Petitioner does not contest the Fifth Circuit's standard. Rather, he argues that his failure to renew his motion for a judgment of acquittal was attributable to ineffective assistance on the part of his attorney, and that the court should therefore apply the conventional standard of review. Pet. 26-28. The court of appeals, however, properly declined to rule on petitioner's ineffective assistance claim because it had not been raised below. Petitioner remains free to assert that claim in a motion under 28 U.S.C. 2255, but absent any finding by the lower courts with regard to petitioner's claim of ineffective assistance, it would not be appropriate for this Court to treat the case as if a timely motion for a judgment of acquittal had been made.

That contention is without merit. The government may prove constructive possession of contraband by "showing ownership, dominion, or control over the contraband itself or the premises or vehicle in which contraband is concealed." *Smith*, 591 F.2d at 1107 (quoting *United States* v. *Ferg*, 504 F.2d 914, 916-917 (5th Cir. 1974)); accord *United States* v. *Soto*, 779 F.2d 558, 560 (9th Cir. 1986), cert. denied, 484 U.S. 833 (1987); *United States* v. *McCoy*, 781 F.2d 168, 171 (10th Cir. 1985). With respect to the pistol found at petitioner's residence on East Warren Street, the evidence at trial showed that petitioner rented that residence, that he lived there, and that he was present when the police officers conducted the search that disclosed the firearm. The firearm, moreover, was found in a maroon suitcase in the bathroom of that residence, a location that was readily accessible to petitioner. And several days before the search, agents saw petitioner enter the East Warren Street residence carrying what appeared to be the same suitcase in which the pistol was later found.[7] Thus, a jury could rationally infer from the circumstances that petitioner had constructive possession of the weapon found in his East Warren Street residence. Gov't C.A. Br. 33-34.[8]

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[7] Petitioner suggests that the firearm belonged to his wife. Pet. 33. Although petitioner's wife testified that she owned the weapon, she originally told police that it did not belong to her. Gov't C.A. Br. 34. At trial, moreover, she was unable to identify which of two firearms belonged to her. *Ibid.* "Under these circumstances the issue of possession was for the jury." *McCoy*, 781 F.2d at 171.

[8] Contrary to petitioner's contention, Pet. 32, the decision in this case is not inconsistent with *United States* v. *Soto*, 779 F.2d 558 (9th Cir. 1986), cert. denied, 484 U.S. 833 (1987). In that case, the defendant was a mere passenger in a vehicle in which the police found firearms. *Id.* at 560. Thus, unlike in the

The same conclusion is warranted with respect to the gun that was found between the mattress and the box spring at petitioner's Sherwood Avenue apartment. Petitioner had personally paid the rent for the apartment several days before it was searched. Petitioner also admitted that he had buried money and jewelry on the property where the apartment was located. The apartment manager testified that she had never seen anyone but petitioner on the premises (although she believed that petitioner's wife was also authorized to use the apartment). Gov't C.A. Br. 33-34. Thus, the second firearm was located in an accessible place on premises over which petitioner exercised dominion and control. Under those circumstances, a finding of constructive possession was justified.[9]

b. Petitioner was convicted of three counts of money laundering in connection with the purchases of a residence, a truck, and an automobile. As the court of appeals held, in order to prove money laundering the government had to show that petitioner "(1) knowingly conducted a financial transaction, (2) which involved the proceeds of unlawful activity, and (3) with the intent to promote or further that unlaw-

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present case, there was no evidence in *Soto* that the defendant had dominion and control over the place where the weapons were located.

[9] Petitioner claims that the court's decision concerning the Sherwood Avenue apartment is inconsistent with *United States* v. *Beverly*, 750 F.2d 34, 37 (6th Cir. 1984), in which the court found the defendant's presence at someone else's residence insufficient to establish constructive possession of firearms found near the defendant at the residence. In contrast with *Beverly*, however, petitioner had dominion and control over the Sherwood Avenue apartment, which he rented.

ful activity."[10] Pet. App. 88. Petitioner does not dispute that formulation; rather, he claims only that the government failed to prove one element of the offense—that the financial transactions involved the proceeds of unlawful activity. Pet. 38-40. Petitioner claims that the government impermissibly relied on his limited income alone to prove that the money he used to purchase the home, truck, and car derived from illegal activity. Pet. 40-42.

Petitioner's contention is unsupported by the record. The court of appeals agreed with petitioner that proof of limited income alone would be insufficient to support a verdict of money laundering. Pet. App. 89 (citing *United States* v. *Blackman*, 897 F.2d 309, 317 (8th Cir. 1990)). The court, however, properly concluded that such proof would be sufficient when combined with additional evidence showing drug trafficking and petitioner's unexplained possession of large sums of currency. Pet. App. 89. The government introduced evidence showing that petitioner engaged in substantial drug trafficking activities during the period in which the financial transactions

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[10] The money laundering statute, 18 U.S.C. 1956, provides in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> > (A)(i) with the intent to carry on or promote the carrying on of specified unlawful activity * * *
> >
> > * * * * *
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property * * *, whichever is greater, or imprisonment for not more than twenty years, or both.

took place. Pet. App. 89-90; Gov't C.A. Br. 35-36. The jury also heard testimony that petitioner received large amounts of cash from his drug sales and that he kept it at his residence. In addition, the police found more than $60,000 in cash hidden at petitioner's East Warren Street residence and buried in the ground at his Sherwood Avenue apartment. Pet. App. 90-91; Gov't C.A. Br. 36.

Petitioner attempted to explain the large sums of cash by offering evidence that he had received a $38,000 inheritance from his mother and an $18,500 inheritance from a former employer. Pet. App. 91. However, the former employer's wife testified that she was unaware of any such bequest and that her husband had left nothing to her or to his children. *Ibid.* In addition, petitioner had previously given the police an inconsistent account of how much he had inherited from his family and had stated that either his father or mother had left him the money. *Id.* at 92. Petitioner was also unable to produce any documentation of his inheritance. Gov't C.A. Br. 36. The jury could rationally infer that the large sums of cash and the money for the purchases did not come from any inheritance.

In sum, the evidence showed that petitioner had limited legitimate income, that he had earned substantial amounts of money from drug trafficking, and that he had large amounts of unexplained cash. From that evidence, the jury was justified in concluding that the funds used to purchase the residence, the truck, and the car came from illegal sources.

4. Petitioner also contends that he was denied the effective assistance of counsel at trial, in violation of his Sixth Amendment rights. Pet. 47-58. However, petitioner did not raise that claim before the district court. The court of appeals declined to consider the

Sixth Amendment claim for the first time on appeal because there had been no opportunity " to develop the record on the merits of the allegations."[11] Pet. App. 93. The court, however, made clear that petitioner was free to reassert the claim in a proceeding under 28 U.S.C. 2255. Pet. App. 93-94. Because neither of the courts below has considered petitioner's claim of ineffective assistance of counsel, and because he is free to reassert his claims in a proceeding under 28 U.S.C. 2255, further review of petitioner's claim is unwarranted at this time.

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[11] The courts of appeals generally will not consider a claim of ineffective assistance of counsel that is raised for the first time on appeal. See, *e.g.*, *United States* v. *McDonald*, 935 F.2d 1212, 1220 (11th Cir. 1991); *United States* v. *DeFusco*, 930 F.2d 413, 415 (5th Cir.), cert. denied, 112 S. Ct. 239 (1991); *United States* v. *Gonzales*, 929 F.2d 213, 215 (6th Cir. 1991). While a court of appeals may consider such a claim if the record below is sufficient to permit evaluation of the claim on the merits, see *United States* v. *Wunder*, 919 F.2d 34, 37 (6th Cir. 1990), the court of appeals in this case properly concluded that the trial record did not provide a basis upon which it could "fairly evaluate" the merits of petitioner's claims. Pet. 94.

## CONCLUSION

This Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for the court of appeals to direct the district court to vacate two of the four sentences imposed under Section 922(g). In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 91-1593

UNITED STATES SUPREME COURT

October Term, 1991

FRANCISCO JAVIER MUNOZ-ROMO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

# REPLY TO BRIEF OF THE UNITED STATES

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Petitioner Francisco Javier Munoz-Romo ("Munoz") files this Reply to the Brief of the United States, showing the Court the following:

## I.
## INTRODUCTION

Having admitted that Munoz's Constitutional rights were violated on two separate occasions, the United States merely asks this Court "to grant the petition, vacate the judgment, and remand the case for the court of appeals to direct the vacation of two of the sentences imposed under Section 922(g)." Gov't S. Ct. Br. 8. All parties, therefore, agree that the Court should grant the petition. The only remaining question is what form of relief should be granted. Because this case is replete with constitutional violations, and because this is a case of first impression for the Court where a conflict exists among the circuits, Munoz believes that this Court should examine the entire record in this case to decide whether Munoz's constitutional rights were violated in other aspects of the case.

## II.
## BACKGROUND

Munoz was arrested for selling narcotics. Rather than prosecute him only for the offense for which he was arrested, the United States, in an effort to "railroad" as many offenses as possible, and perhaps realizing that Munoz was not effectively represented by counsel, chose to charge and try him with a myriad of offenses that were completely unrelated to his narcotics offense. Munoz was indicted and sentenced for possession of a firearm by a felon, possession of a firearm by an illegal alien, various counts of money laundering, and the narcotics offense.

The "railroading" did not stop with the indictment and the trial. The United States somehow convinced the trial judge on two different occasions to impose two sentences for the same offense. Munoz was sentenced as a felon-in-possession of firearms and sentenced under the sentence-enhancement statute, 18 U.S.C. § 924(e). The United States has admitted that this double sentence violated Munoz's

Constitutional rights against Double Jeopardy. Gov't C.A. Br. 27.

Munoz was also sentenced under both the felon-in-possession statute and the illegal alien-in-possession statute. That is, Munoz was given two sentences under the same subsection of 18 U.S.C. § 922. Munoz argued before the Court below that this double sentence violated the Double Jeopardy Clause of the Constitution. The Government, knowing that Munoz's position was correct under the law, nevertheless urged the Fifth Circuit Court of Appeals to adopt a position that violated the Constitution. Now, before this Court, the United States has finally admitted that this double sentence violated Munoz's constitutional rights against Double Jeopardy. Gov't S. Ct. Br. 8.

Munoz submits that the violation of his constitutional rights is not limited to the two double sentences that he received. This case is replete with constitutional violations, and for that reason this Court should grant the Petition for Writ

of Certiorari on all questions presented and review the entire record in this case.

## III.
## THIS COURT SHOULD GRANT THE PETITION TO REVIEW THE SENTENCES IMPOSED FOR VIOLATIONS OF THE FIREARM-POSSESSION STATUTE

### A. Allowing Petition to be Charged Under Both Subsections of Section 922 Severely Prejudicial Munoz's Rights to a Fair Trial.

When Munoz was indicted, the United States knew, or certainly should have known, that he could not be charged and sentenced as both a felon-in-possession and an illegal alien-in-possession of a firearm. The United States has now admitted that the trial court was wrong in imposing these double sentences. Gov't S. Ct. Br. 8. Indeed, the position the United States now takes on these Double Jeopardy claims is directly contrary to the position it took before the Court of Appeals. In the lower court, the Government successfully argued that Munoz could be constitutionally sentenced under both subsections of Section 922. See Gov't C.A. Br. 24-26. Now, the Government admits that such a double sentence violates the Double Jeopardy clause of the

Constitution. The United States has, therefore, admitted that the holding of the Fifth Circuit Court of Appeals in this case is wrong. For this reason alone, this Court should grant the Petition. Further, it was undisputed that Munoz was both a felon and an illegal alien. The Government's motive in charging and trying Munoz on both counts, in violation of his constitutional rights against Double Jeopardy, could only be for one reason; to taint the jury with the fact that Munoz had prior felony convictions and the fact that he was an illegal alien. Not only did the introduction of this evidence violate Munoz's rights under the Fifth Amendment of the United States Constitution, it also violated Munoz's due process rights as guaranteed by the Fifth Amendment.

Moreover, as pointed out in his Petition for Writ of Certiorari, evidence regarding Munoz's prior convictions should not have been introduced at the trial. See Pet. Reply Br. at 18-20. The introduction of this evidence, and allowing it to go to the jury room, severely prejudiced Munoz's rights

to a fair trial. Consequently, Munoz asks that this Court grant his petition, vacate the judgments against him, and remand this case to the district court for a new trial.

B. The United States Has Failed to Introduce Sufficient Evidence that Munoz Possessed the Firearms in Question.

Once again, the United States argues that Munoz's occupancy of a residence is sufficient for the jury to conclude that he possessed firearms found at that residence. Gov't S. Ct. Br. 10-12. Congress intended differently when it drafted Section 922, and the Government has failed to prove that Munoz "possessed" these firearms under the relevant definition of possession.

The United States has argued that Munoz constructively possessed the firearms. To prove constructive possession, the Government had to prove that Munoz had the intent and the power to exercise dominion and control over the weapon. See United States v. Smith, 591 F.2d 1105, 1107 (5th Cir. 1979); United States v. Donofrio, 450 F.2d 1054, 1056 (5th Cir. 1970). Thus, the Government was

required to prove both that Munoz intended to exercise dominion and control over the gun and that he had the means available to effectuate his intentions. The Government failed to meet this burden of proof.

To prove that Munoz intended to exercise control over the firearms, the Government was required to prove that Munoz knew of the gun's existence. It is axiomatic that one cannot intend to control a firearm that he does not know exists. Several courts have held, therefore, that the Government must prove that the defendant knowingly possessed the firearm to sustain a conviction under section 922. See United States v. Hastings, 918 F.2d 369, 371 (2d Cir. 1990); United States v. Rumney, 867 F.2d 714, 721 (1st Cir. 1989), cert. denied sub. nom., Taylor v. United States, ___ U.S. ____, 110 S. Ct. 2592 (1990); United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988); United States v. Hatfield, 815 F.2d 1068, 1072 (6th Cir. 1987); United States v. Bruce, 704 F.2d 1048, 1049 (8th

Cir. 1983); United States v. Allen, 699 F.2d 453, 458 (9th Cir. 1982).

The evidence here proves only the converse; Munoz had no knowledge that the firearms were located on the premises. Consequently, the Government failed to meet its burden of proof to show constructive possession of the firearm under section 922(g). This Court, therefore, should grant the petition and reverse the convictions for firearm-possession.

## IV.
## THE GOVERNMENT HAS FAILED TO PROVE ESSENTIAL ELEMENTS OF THE MONEY-LAUNDERING COUNT

### A. The Government Failed to Establish the Necessary Nexus.

The United States argues that, because large amounts of cash were found at Munoz's residence, the verdicts and sentences for money-laundering should stand. The United States misses the point.

In order to prove that Munoz violated the money-laundering statute, the United States was required to prove that, when he purchased the property in question, he used the proceeds from illegal

activity. The money-laundering statute is relatively new. Indeed, this Court has not had an opportunity to review the substantive aspects of this statute. The courts that have addressed this statute have ruled that the Government must prove that the property in question was purchased with proceeds which derived from illegal activity. See United States v. Hollis, 1992 W.L. 17974 (10th Cir. 1992) (holding that jury instruction was proper where it informed jury that proceeds had to be criminally derived); United States v. Awan, 996 F.2d 1418, (11th Cir. 1992) ("[G]overnment [must] prove that a defendant knew that the proceeds stemmed from felonious activity.") (emphasis added); United States v. Posters-N-Things, 1992 W.L. 158539 (8th Cir. 1992) ("[T]he Government had to prove that [the defendant] knowingly conducted a financial transaction that involved the proceeds of an unlawful activity . . . ."); United States v. Levine, 1992 W.L. 148203 (10th Cir. 1992) ("[T]he Government must plead and prove the funds involved represented the proceeds of some form of unlawful

activity."). Under this standard, there is no evidence in the record to support the money-laundering convictions.

The United States proved only that Munoz bought several items (a car, a truck, and a house) years prior to his arrest, and years later he was found with large amounts of cash at his house. The Government was in no way able to prove that the cars and the house that he purchased were purchased with the proceeds of illegal activity.

Under the Government's argument, any person who is found with cash from illegal activities could be charged and sentenced with money-laundering, for any property he had purchased in the past, regardless of whether that property was purchased with the proceeds of illegal activity. This is clearly not what Congress intended when it enacted Section 1956. Rather, Congress intended to allow prosecutions of individuals who used the proceeds of illegal activity to purchase items in furtherance of their illegal activity. See Levine, 1992 W.L. 148203 ("A reading of the statute reveals its obvious purpose

to criminalize the use and funds from an illegitimate source in a legitimate transaction"). Hence, the Government is required to prove a nexus between the item purchased and the proceeds of illegal activity.

Several courts have required the United States to establish a causal nexus between illegal activity and particular funds in order to support a conviction or a forfeiture action. See United States v. $4,245,000, 762 F.2d 895, 903 (11th Cir. 1985) (holding that Government must show probable cause that seized property was involved with illegal drug or money-laundering transactions as specified by statutes), cert. denied, 474 U.S. 1056 (1986); United States v. All Monies ($477,048.62), 754 F. Supp. 1467, 1471 (D.Ha. 1991) (same); United States v. 88 Designated Accounts Containing Monies Traceable to Exchanges for Controlled Substances, 740 F. Supp. 842, 845 (S.D.Fla. 1990) (same). Thus, Courts have required the United States to trace the proceeds to the illegal activity. Hence, the Government was required in the instant case to trace

the funds used to purchase the subject property to some form of illegal activity. The Government failed to meet this burden. Accordingly, the trial court should have granted the defendant's motion for acquittal on the money-laundering counts.

This is a case of first impression regarding the substantive portion of the money-laundering statute. The Fifth Circuit's holding in this case is tantamount to a holding that the Government is not required to prove a nexus between the property purchased and some form of illegal activity. This holding, therefore, is in conflict with rulings in other circuits which have held that the Government must establish this causal nexus. This Court, therefore, should grant the Petition and resolve this apparent conflict.

B. The Government Failed to Prove the Necessary Intent.

1. The Necessary Intent to Carry on Illegal Activity

Moreover, the Government failed to produce any evidence in support of another element of the statute; that, at the time Munoz purchased the

properties, he intended to use the properties to carry on a specified unlawful activity or that he intended to use this property to conceal his illegal activity. There is no evidence in the record tending to support this allegation. On this basis, the Government failed to meet its burden of proof.

2. The Necessary Intent to Conceal the Illegal Activity

The Government also failed to prove that Munoz purchased the car, truck, and house with the intent of concealing his illegal activity. Several courts have held that intent to conceal is an element of the money-laundering statute. See Posters-N-Things, 1992 W.L. 158539 ("[The Government must prove] that the financial transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds"). In United States v. Sanders, 929 F.2d 1466 (10th Cir. 1991), the court was presented with an identical question based on nearly identical facts. In Sanders, the defendants were convicted of money-laundering based upon their

purchase of two automobiles, much like two of the money-laundering counts asserted against Munoz. The Tenth Circuit, however, overturned those convictions because the defendants were present when the cars were purchased and the defendants used the cars conspicuously. Thus, the court reasoned, the Government failed to prove the necessary element of concealment.

> We reject the Government's argument that the money-laundering statute should be interpreted to broadly encompass all transactions, however ordinary on their face, which involve the proceeds of unlawful activity. To so interpret the statute would, in the court's view, turn the money-laundering statute into a "money spending statute." This interpretation would be contrary to congress' expressly stated intent that the transactions being criminalized in the statute are those transactions "designed to conceal or discuss the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." Thus, by the expressed terms of the statute, a design to conceal or disguise the source or nature of the proceeds is a necessary element for a money-laundering conviction. In other words, the purpose of the money-laundering statute is to reach commercial transactions intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities.

> Further, we agree with Defendant that the evidence of a design to conceal the nature or source of the proceeds used to purchase the cars was insufficient to support her convictions. Clearly the transactions involving the purchase of the Volvo and to a slightly lesser extent the purchase of the Lincoln, differ from what could be described as a "typical money-laundering transaction" in the Sanders' failure to use a third party to make the car purchases and thereby concealed the buyers identities. As outlined above, both Defendant and her husband, Johnny Lee, were present at the purchases and were readily identified by the respective sales persons involved. Further, both cars were conspicuously used by the Sanderses, making the association of these vehicles with the Sanderses obvious to law enforcement.

Id. at 1472 (citations and footnotes omitted).

In Munoz's case, the Government also failed to prove the necessary element of concealment. The record demonstrates that Munoz personally purchased the automobile and truck at issue in this case. The record also demonstrates that Munoz used these vehicles conspicuously, making his association with these vehicles obvious. Clearly, therefore, the Government failed to show that the Munoz had the necessary intent to conceal or disguise the relationship of the cars purchased with the person

providing the proceeds or that the proceeds derived from illegal activity. Under Sanders, the trial court should have acquitted the Munoz of the money-laundering claims.

In sum, the money-laundering convictions are not supported by legally sufficient evidence. Consequently, this Court should grant the petition for writ of certiorari.

## V.
## MUNOZ'S INEFFECTIVE ASSISTANCE OF COUNSEL CAN EASILY BE DETERMINED FROM THE RECORD BEFORE THIS COURT

The Government argues that there is insufficient evidence in the record to support Munoz's claim of ineffective assistance of counsel. Therefore, the United States argues, Munoz's only right should be to assert the claim in a proceeding under 28 U.S.C. § 2555.

Contrary to the Government's position, there is enough evidence in the record from which this Court can conclude that Munoz's Sixth Amendment rights to effective assistance of counsel were violated. First, Munoz was twice exposed to Double Jeopardy,

as the Government has already admitted. Yet, his counsel did not even raise the Double Jeopardy defense. See Murphy v. Puckett, 893 F.2d 94, 95 (5th Cir. 1990) (holding that failure to raise double jeopardy defense constitutes ineffective assistance of counsel under the standards set forth in Strickland v. Washington).

Further, as stated in the Petition for Writ of Certiorari, the record in this case has ample evidence of Munoz's ineffective assistance of counsel. See Pet. at 18-21.

This Court has the power and authority to address Munoz's claims that he was denied his right to effective assistance of counsel. Given the gravity and severity of the errors and omissions made by Munoz's trial counsel, this Court should exercise that power and authority and remand this case to the district court for a new trial at which

Munoz can be given effective assistance of counsel.

## CONCLUSION

For all the reasons stated herein, this Court should grant the petition for writ of certiorari.

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